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THE LAWFUL PURSUIT OF GAIN

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BARBARA WEINSTOCK
LECTURES ON THE MORALS
OF TRADE

This series will contain essays by representative scholars and men of affairs dealing with the various phases of the moral law in its bearing on business life under the new economic order, first delivered at the University of California on the Weinstock Foundation.

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THE LAWFUL PURSUIT OF GAIN

INTRODUCTION

A LITTLE more than two thousand years ago there lived in widely separated cities near the shores of the Mediterranean two men who did not know of each other's existence nor even, in all likelihood, of the existence of each other's country. One was the Roman, Marcus Porcius Cato, whom we know as Cato the Censor. The other was a Jew, Jesus (or possibly Simon), the son of Sira, whose book by a series of accidents has come to be called "The Church Book" — Ecclesiasticus. Cato was something of a parvenu, of slight intellectual cultivation, a first-rate soldier, a competent statesman, brutal, red-haired, and painfully stingy.

Ben Sira was a gentleman and a scholar, indifferent to politics and averse to war. Both were austere in their morals and a little difficult, perhaps, in social intercourse. Further, they had both a shrewd common sense and a disinclination to be hoodwinked. And they also had in common a distrust of commerce and a poor opinion of merchants.

"A merchant," said Cato, "may, I do not doubt, display a laudable energy in the pursuit of gain, but he does so at considerable risk to his fortunes." [1]

Ben Sira is even more direct: "A merchant shall hardly keep himself from wrongdoing and a huckster shall not be acquitted of sin." [2]

These men represent, in widely differing societies, an ancient and inveterate attitude toward trade. Wealth was desirable and its accumulation praiseworthy, but its proper source was war or husbandry. To obtain it by buying and selling merchandise was not in itself harmful or ignoble, but it was

fraught with danger. Wealth so procured was in the first place unstable. It came easily and might go easily. And secondly there was the double opportunity of fraud and oppression, once when the merchant got his wares and once when he disposed of them. He might have given less for them than he should and he might be taking more for them than he ought.

All this rests upon a notion that there is an amount which he should have given or taken, and if we follow this notion to its source, we shall discover that it really excludes trade altogether as a means of honorably acquiring wealth. Two things seem extremely likely in the history of Mediterranean commerce: one is that barter from which sale sprang was originally conceived of as an exchange of gifts between friends, and the second that systematic and professional barter was at first confined to foreigners.[3] Foreign commerce again was not essentially different from freebooting, and

to have argosies at sea did not usually mean that the Argonauts intended to pay for the golden fleece when they had found it.

The converse of this is, of course, that foreign merchants in any community were under suspicion of being no better than they could help. The only security against direct plunder was the danger of reprisals, and, when commerce became a settled custom, the need of returning to the same source of profit year after year.

The business of merchandising, therefore, began with a handicap. In the villages of Palestine it was represented by a Canaanite huckster,[4] a man who feared not God, and by a Sidonian ship in the ports of Hellenic cities, manned by bearded Syrians who scudded away before one could repent of a bargain.[5] That the Greeks quickly learned the lesson and bettered it, and that it was in this enhanced form that it got to the Romans, made it only the more evident to both peoples how profit was made by trade.[6]

Further, we must remember that the basic transaction was barter, and that barter in its origin seems to have been an interchange of gifts. Such an interchange between friends ought to be equal. We remember how Glaucus and Diomede exchanged shields in the Iliad and how Diomede ruefully discovered that he had given gold for brass, a hundred-oxen shield for a nine-oxen one.[7] It was a sort of overreaching to get more than you gave, and evidently if we get only what we give, that is not a good way to make a profit out of the transaction.

This attitude early made way for a more rational one. But its effect has lasted, and it reappeared in full force in medieval Europe, where the position of the Church in the matter was an amalgam of philosophical contempt of wealth and Christian repugnance to the vanities of a transitory existence.

But it may be well to keep in mind that contempt of commerce was not so general

in the ancient world as it is often made to appear.[8] Both Ben Sira and Cato called attention to the dangers incident to commerce. That it was in itself objectionable, they do not say, and as far as the Greeks were concerned, the attitude of Plato and Aristotle, which is directly hostile to commerce, is a highly personal one. It is a reflection of the official attitude of that Spartan state which gave more than one element in a sublimated form to Plato's ideal Republic.

For the majority of Greeks, philosophers, statesmen, soldiers, poets, and artists, quite as much as for ordinary burgesses, commerce was as natural as dining and almost as common.[9] We do, to be sure, hear of the wide chasm between merchants proper, ἔμποροι and hucksters, κάπηλοι, and we are not infrequently told what an unsavory lot of rogues the latter were. That is to say, it is often pointed out that big business and little business are different things, and that lying, cheating, and cringing, which make any

occupation contemptible, are to be found chiefly in the latter.[10]

It is too bad that our information comes from the big business men and their friends and that the hucksters have left no literary spokesman. But it is likely enough that the description is substantially true. The market-place is not the nurse of manners, and those who must compete for small gains in order to make a poor living are apt to exhibit their sordid anxieties a little more openly than gentlemen should. Perhaps, too, the eagerness of sharp wits to rub against each other, which found its highest expression in Colonnade and Garden and Porch and Grove, was deflected into that delight in haggling — almost for its own sake — which is not rare in the Mediterranean.[11]

But in the upper reaches of business, where one dealt with consignments and cargoes, with granaries and factors, a man could keep his integrity, his dignity and his profits, all at the same time. Merchants

would not be admitted to citizenship in Aristotle's properly conducted polity and barely to residence within Plato's ideal city.[12] They were none the worse in fact for this exclusion, inasmuch as these wisest of wise men were never seriously considered in the constitution of states, although founding cities was the favorite occupation of men in the centuries after Aristotle.[13]

In those cities, as in almost all others, merchants were welcomed, and out of merchant states, like Rhodes and Carthage, empires grew which were absorbed into the Roman system with a profound influence on the minds of the new masters of the world.

None the less, exclusion from an ideal is not a negligible punishment. Plato and Aristotle were not the intellectual gods of the Roman Empire, any more than they had been in Hellenistic Greece. In the economic organization of the Empire, commerce was a vital factor, and the law of the Empire had a great deal to say even of cabbage-dealers

in the truck-markets. Cicero is very clear on the honorable vocation of men who do business on a large scale, and even the mawkish Seneca professes no aristocratic or philosophical scorn of profitable commerce.[14]

But when the Roman system broke and a new system gradually emerged in the West, it was dominated, first, by men who were committed to a theory which made of riches in this world something worse in the next world than poverty, and later, by men who found in Aristotle and Plato the philosophic basis of this religious dogma. It is true that even here a place was found for the great merchants who carried the plenty of one land to supply the want of another. From these men and the silk- and wool-clad lords of the Hansa, one descended precipitously to the peddlars and mongers at the outskirts of fairs. And in the Middle Ages as in the early Renaissance, there was abundant illustration of cities whose merchants were princes, whose traffickers were the honorable of the earth.

Indeed, it was often enough the case the princes were merchants. Cosmo dei Medici made his counting-house a palace, but Edward IV and Henry VII, as well as other Renaissance despots, did not scruple to make their palaces counting-houses.

Still there was a better and a worse in all this. It remained a little better to inherit wealth than to acquire it, and if it must be acquired, it was more gentlemanly to do so as Cato and Ben Sira thought it should be done, by the bounty of a luxuriant soil and the multiplication of fruitful cattle. There was a deeply ingrained belief that there must be a short and a long end to every bargain, and that the one who got the short end on one occasion must be consoled by the hope of the long end on the next. People might acquiesce in this, but the morality it implied was consciously accepted as a lower level of conduct. One did not expect merchants any more than lawyers to exhibit unmistakable signs of grace. It has often been pointedly

remarked that extremely few lawyers succeeded in becoming saints without renouncing the law, but apparently there were still fewer merchants.

Another element of modern business, speculation, or the discounting of future changes, had to raise itself from a still lower depth. To buy goods in the hope that they will rise in value, indeed, to buy them in order to resell them at all,[15] forestalling and "regrating" were for a long time deemed a peculiarly wicked and cruel type of fraud.[16] In many parts of Europe it is only in relatively recent times that these things have ceased to be crimes.[17]

Accordingly, in ancient society and in medieval society, merchandising proper might be reputable, and for a time honorable — but speculation was quite disreputable. The change made by the Renaissance and the Reformation was that commerce became highly honorable and speculation at least ceased to be dishonorable. But not

even in modern society have we been able to rid ourselves completely of the feeling that the scale of moral values applied in business must necessarily be in the lower registers. The angels, it may be, live perpetually in the region above the treble clef. Business men do well if they do not sink below the bass.

CHAPTER I

LAW AND THE HARD CREDITOR

WHAT men thought of merchants and commerce was one thing. What their legal agencies were willing to do about it was another.

The ineffectiveness of the law is one of the most widely discussed of modern topics. So much of this discussion as spills over into the newspapers and the too public utterances of semi-public men does not seem to be excessively intelligent. Apparently the difficulty that is found with the law is that it has not succeeded in making men love their neighbors as themselves. It is quite true that law has not done so. And if the law ever attempted it, it would deserve to be characterized as Mr. Bumble the Beadle did, when he said that the law was a hass.

Law and morality and a few other things were at one time identical. That is to say,

the same persons were required to determine what was legal, moral, mannerly, pious, customary, and proper. A severance was ultimately made in most of these things, and for several of them a special social mechanism was devised which in a short time became an institution in its own right. But the severance was never complete, and at various times and in various places, attempts have been made at a reintegration. They were always without permanent effect except so far as they produced a certain confusion. Lawyers were never quite certain as to how much morality was expected of them and laymen could not know surely to what extent the law would apply moral judgments.

It is currently supposed that law is always a little behind general morality and that the changes in moral estimates as recorded by courts must necessarily follow after an appreciable interval those recorded in practice. That is an error. The morality applied by courts of law is sometimes in advance of that

generally held, and sometimes behind it. As striking examples of the former, we may instance the witchcraft trials, in which judges for two generations labored, and generally in vain, to save the accused from the ferocity of juries;[1] and the fact that at the present time our criminal statutes are far above the crude vindictiveness shown by even educated laymen in cases which stimulate their imagination. On the other hand, in other fields of law, courts will enforce bargains which public opinion reproves, and will often distribute losses or fail to do so in a way definitely at variance with the best popular notions on the subject.

The tendency of a social mechanism to develop values of its own is a well-known phenomenon. The association between morals and law was always sufficiently close so that a marked divergence between the values so created and independently developing moral values seemed an evil which needed a remedy. Western systems of law sought

to establish the required corrective in the moral sense of the administrator, provided that the administrator was not himself altogether a specialized functionary of the legal system. That was nowhere so systematically done as in England in the Court of Chancery, where the King in his chief adviser's person administered a law different from that of his ordinary courts. It was generally a supplementary law, one which was infused with a kind of legal morality; that is, a morality which would satisfy the robust conscience of an honest Englishman, though it might leave less satisfied the tenderer consciences of anxious precisians. The growth of this Chancery law or Equity, its stimulation in the eighteenth century by the doctrines of reason and natural law, its profound influence on the law of the Common Benches, the almost successful attempt of nineteenth-century Chancellors like Eldon to harden it into machinery, all that is a fascinating story which cannot be detailed here.

The history of Roman equity was quite different. Before the Roman political system had reached its final form, Equity had officially absorbed the specialized Civil Law, and the legislation of Justinian takes it for granted that a divergence between a legal and a moral judgment will be extremely rare and will invite the special attention of the judge. When medieval Christian Europe developed a new law into which Church law, local customs, and the Byzantine Code of the Roman law entered in varying proportions, the same assumption was theoretically made. But under the baleful influence of feudalism, legal administration became the privilege of a caste or something like it, and the rather stilted Equity of the books became in practice a rhetorical embellishment of procedural tangles. It was not till the revolutionary movements at the end of the eighteenth century that a new direction was given to Continental law, which ended in an effective recognition of the principle that a

legal result which is at variance with prevailing morality may be ultimately defensible, but very urgently needs defense.

Systems of Equity are not quite enough for the moralist and not quite enough for popular feeling.[2] It has turned out that Equity borrows something of the stiffness of the other branch of the law in the very act of softening it. It is this stiffness that makes the complete system, composed of both law and equity, partially independent of ethical developments in other social agencies and inclined to determine for itself how far it will accept values which are in the course of getting themselves established elsewhere.

This is nowhere better illustrated than in the relation of the law to the changing attitudes toward mercantile practices. Certain of these practices were judged bad by the moral guides of the community. Did the law assist these guides or hinder them? Or did it merely offer an additional and scarcely necessary confirmation to a determination fully

arrived at and completely executed by the consensus of society?

In asking and answering these questions, I shall in the main confine myself to our own law — the law, that is, of the Anglo-American system. Parallels enough could be found in contemporary European developments, and for much that we have, the impulse came from abroad and often the developed institution as well, *corpus cum causa*. But we shall have enough to do in sketching the intricate pattern that law and morals have traced in our own system, and we shall have occasion to glance elsewhere only for fuller illustration.

Against commerce it has been charged that its purpose is greed and its methods cruelty and disloyalty; that its end is pride, the destruction of the soul and the decay of the commonwealth. These are grievous things, and in the year 1569 Thomas Wilson, Doctour of the Civil Lawes and one of the Masters of Her Majestie's honourable courte

of requestes, said because of one single mercantile practice, "I do verely beleve the end of thys worlde is nyghe at hand." [3]

Although the business of merchants is buying and selling, they did not invent buying and selling nor did they invent credit. And merchants as creditors took over methods and processes developed by those very landowners and stockraisers who were prone to regard merchandising as evil and dangerous. The processes were hard and cruel on debtors, but whereas there was between the landlord-creditor and the tenant-debtor a certain relation of patron and client, there was none of that between the merchant-creditor and his debtor. Inhumanity in this relation seemed a little less qualified and therefore was more resented.

It is true that the creditor begins with elementary morality on his side. The defaulting debtor has been guilty of a breach of faith. He has promised and has not performed. And in modern times the unfortu-

nate creditor who has entrusted his life's savings to a slippery and evasive debtor is at least as common as the harsh creditor who pursues his claim to the ruin of his debtor.

But if the creditor may call for the fulfillment of a plighted word and the debtor may cry out against oppression, their pleas have been differently heard by the law. The creditor as a rule has found it easier to persuade courts to aid him. That is what we might expect since the prevailing government of Western Europe has almost continuously been some form of oligarchy and an oligarchy tends to become a government by creditors. In other words, the law has more often condoned inhumanity than breach of faith and has itself undertaken the repression of the latter and left the former to the *mores* of the community. And in doing so, it has not succeeded in persuading poets and moralists that it acted as a champion of outraged truth rather than as an instrument of power.

The one form of inhumanity which per-

mits a creditor to seek satisfaction by seizure of the debtor's person was almost a matter of course.[4] Debt-servitude, quasi-debt-servitude, imprisonment for debt — all these things have succeeded each other in European history, and the last, as we know, has been but recently abolished in England.[5] Substantial vestiges of it are still to be found there and in the United States.[6] That the law has been reluctant to yield to popular pressure in this matter is a fact which cannot be gainsaid. Doubtless the law had behind it a popular pressure of an opposite sort, since the term "people" generally means those whom we know best and hear most about, and lawyers and judges saw and met creditors more frequently than debtors. But yield in the main the law did, so completely that it went to the opposite extent. The result is that the great majority of claims, however just, cannot to-day be collected by legal process. And among the various ways in which remedy for this last thing is sought,

no one now seriously suggests bodily constraint of the debtor.

Even long ago, in Rome itself, if the inhumanity was terribly patent, the creditor — even the just creditor — was not allowed to have it all his own way in the courts. Relief of distressed debtors in ancient times usually took the form of revolutionary and therefore exceptional measures, but these measures sometimes became permanent and institutional. Solon, it seems, abolished debt-servitude in Athens and the tribunician power qualified it somewhat at Rome.[7] It did not completely disappear anywhere, but it almost never again received the approval of the law.

In Rome one went still further, and for certain classes of debtors, there was established what was later called the *beneficium competentiae*, the privilege of pleading poverty.[8] Debtors who bore some special relation of trust or kinship to their creditors possessed it, and at one time it operated as a

modified discharge in favor of any debtor who had shown a real disposition to satisfy his obligations as far as he could.[9] This was a considerable advance. Although the extent to which it was applied has varied somewhat, it was revived again in very modern times and has become the principal basis of the institution of bankruptcy which originally had little to do with it.

The law, in other words, has not completely ignored the basic virtue of humanity, the loving-kindness of man toward man, even when it was compelled thereby to distinguish between what was legal and what was just. Indeed, Roman jurists accepted as a working principle the doctrine that legality carried to an extreme becomes itself illegal. *Summum ius summa iniuria.*[10] Strange and modern as it sounds, it is established and ancient law that men do not after all stand on a level when they face their judge, and that what is enforceable by Lazarus against Dives is not always so enforceable when the rôles are reversed.

CHAPTER II

LAW AND THE RAPACIOUS CREDITOR

LAW and Morality were both concerned with the manner in which a man enforced a just claim. They were, of course, even more concerned in determining whether it was just.

What makes a claim just? In the older systems, it was just if it was correctly acquired, correctly demanded and correctly enforced — "correctly" meaning, in every case, in accordance with set forms and in an established sequence of acts.

But Morality, harking back unconsciously to the beginnings of trade, had not forgotten that business originated when two men exchanged equal gifts to begin a friendship or to cement it. If the ostensible friends were the lion and the lamb, was it likely that the exchange would be equal? And when out of

casual and voluntary exchanges of surplusage, there grew up a system in which men had to bargain for the necessities of their lives, it became apparent that the parties were frequently unequal, that one was stronger than the other.

Was it just, when the stronger man had the better of the bargain? When Glaucus got a gold shield for a bronze one from Diomede, even Diomede's bard chuckled a little, because Diomede was, if anything, a stronger man than his Lycian friend and should have been more wary. The thing would be different if the loser had no choice but to enter the contract, or if his ignorance or feebleness were deliberately utilized.

The difficulty is in knowing who has the better of a bargain. Glaucus's shield was not worth Diomede's as metal, since bronze and gold were at that time at about the ratio of one to eleven. But who knows whether it did not have other elements of value, particularly to Diomede? It may have been

more beautiful. It may have had a history. And there is no evidence that Diomede was not perfectly satisfied. But very early in organized communities one spoke of the value or the worth of a thing, and the notion spread that, if in a commercial transaction, the values are not equal, somebody has been outwitted.

Curiously enough, popular morality did not at once assume that such outwitting was objectionable. It was apparently unobjectionable as between men of different states. Trading was a semi-hostile contest and the victor might properly take his booty. But toward one's own countrymen, it was decidedly objectionable. Men did not buy at home unless they were in need.

It is not surprising that at the beginnings of commerce, there was no carefully worked-out theory of value. There was, of course, no theory at all. People vaguely felt that the value of a thing was a quality of it as much as its color or its shape and this de-

plorable economic concept got itself firmly fixed in the minds of most persons.

It is the doctrine of the "right price," the *justum pretium*, a phrase which occurs in the Roman jurists of the second and third centuries,[1] but was fully stated by Plato in his book on the Laws.[2] It is not surprising that this desperately unsound economist should add this error to his other economic and political misapprehensions, but it remained for the medieval Church to carry it out to a theoretical extreme which diverged more and more from the ordinary practices of both mercantile and non-mercantile life.

It seems clear enough that the medieval schoolmen imagined that the proper price, the *justum pretium*, was something like an objective fact, independent of the personal desires of the seller and buyer, and of the accidental circumstances of the sale.[3] This has been declared to be an impossible conception, and economists have never been quite so jaunty and quite so self-confident

as when they were riddling this absurd and futile doctrine which runs counter to every principle of every orthodox school.[4]

I do not propose to defend it in the form I have just stated. If there is an exact equivalent in price of every commodity and if this exact equivalent is permanent, then the rule that no one should ask more for anything than its equivalent, or refuse to give this equivalent, brings us back to the hypothetical origin of sale. It is not a good way of doing business and it must end with the elimination of commerce altogether. Doubtless the scholastic doctors envisaged this possibility without a qualm.

This, evidently, it is not open to us to do, and we can therefore make nothing of a *justum pretium* which is a sort of mystic double of the thing valued. But when courts take the position, which they have often enough taken, that they cannot determine what price a man should ask or give because the doctrine of the *justum pretium* is re-

jected by all economists, and that therefore a thing is worth what any particular buyer will give for it, no less and no more, courts have, I think, shifted the problem somewhat.

The Roman courts up to the Byzantine period, and the English and American courts throughout their history, said they would have nothing to do with a *justum pretium*. A bargain was a bargain. If there was no fraud, no force, no threats, no obvious inadvertence, it was a man's legal duty to give what he agreed to give, even though he later found that he was paying too much. Two jurists in the second and the third centuries regretted that it was so, but the great weight of legal authority found no difficulty with it.[5]

The Roman idea of fraud was so much larger and more flexible than the English that the likelihood of hard bargains was a much smaller one than in modern times. To this was added a special enactment in the Byzantine period which protected the seller whenever he had received less than

half the *justum pretium*.[6] The buyer, who was pretty well safeguarded by the Roman rules of warranty, could not use this new privilege.

This late Roman doctrine, afterwards called "lesion," has remained a fundamental principle of Continental law. The medieval theologians and jurists refer to it frequently, and in the codes of the nineteenth and twentieth centuries,[7] it was expanded into a general test for all contracts, omitting, of course, the arbitrary fraction of one half. Any contract, oppressive for any reason, could be corrected by the court, and it was certainly an oppressive contract if a temporary need is exploited by one man to another's disadvantage.

But in England and the United States the courts have shrouded themselves in the economic wisdom that if a party to a contract cannot determine what is fair for himself, a court surely cannot do so.

Can a court really do nothing about it?

If A has agreed to give one thousand dollars for B's fountain pen — an ordinary pen of an ordinary make — must courts treat this as though fountain pens were regularly sold for that price? As a matter of fact, they were not always so helpless even in our system.

I have mentioned that curious fact of English and American law which divides our procedure into Law and Equity. We are familiar with the traditional "Wicked Partner," whose harsh insistence often compels a kindlier associate to refuse what he would otherwise have been glad to grant. In this case the severe English law provided itself with a "Kind Partner," who if he got a chance found it in many cases easy to do what the other had sternly said was quite out of the question. When the contract is of a kind that its enforcement can be sought in Equity, the "Kind Partner" of the English system, the courts of England did examine what they called the "adequacy of

the consideration," which means the rightfulness of the price. To be sure, that inveterate reactionary, Lord Eldon, succeeded in inducing the courts to interfere only when there was fraud as well as inadequacy.[8] But John Romilly, the son of a better man than Eldon, held out ineffectually as Master of the Rolls for the more equitable rule.[9]

Eldon's restriction was taken over by most American courts, not without much murmuring of judicial minorities.[10] And Eldon himself was prepared to call a contract unenforceable in Equity if the price was grossly inadequate, so inadequate as to shock the conscience, even such a conscience as that dour and flinty-hearted oligarch possessed.[11]

But in any case the courts discovered that it was quite easy, when they really wished to, to assert that the price was inadequate, though they often said they would do nothing about it; and in at least one case it was a question of paying five thousand

pounds instead of the adequate sum of thirty-five hundred.[12] How did the courts find out what the adequate price was? Well, the process involved no sorcery. Land values were testified to by solicitors with a fair degree of accuracy and apparent uniformity.

In the era of standardization, it really is not hard to know the price of most commodities. For one thing, the papers publish those prices, and we can discover daily that oats are firm at ten cents and butter wavering unsteadily between twenty and twenty-one. Therefore, if we reject the *justum pretium* of the schoolmen, and even the "natural price" of Adam Smith, the ordinary price which a great many persons are willing to pay is not altogether hidden from us.

Then the problem which exercised the later Roman law and the entire Middle Ages can be rephrased as follows: May one in good conscience ask of a particular man a great

deal more than most men would pay? Will the law sanction such a bargain, even if morals will not? We may answer both questions in the affirmative if we like, but if we do, we must not take refuge behind artificial impossibilities.

Why should one man ever give more for a thing than any one else would? It can only be because of his ignorance that he can get it cheaper elsewhere or because of an immediate and urgent need that will not permit deferring the purchase long enough to go elsewhere, or because no one else will deal with him. The seller is not responsible for the buyer's ignorance or for his necessity. May he profit by it?

The question is hardly a pressing one in ordinary commercial transactions. Under modern conditions of production and marketing, ignorance of standard prices is rare, and so urgent a necessity that it cannot be satisfied at any other time and place is perhaps even rarer. But ever since the Middle

Ages, the question has been fused both by the theologians and Continental lawyers with the question of usury, with the traffic in money, a wholly different matter in its origin and based on different presuppositions.

Public opinion — that is, the opinion of the great majority of persons — has been fairly constant in regarding excessive interest on money as wicked. The medieval Church regarded any interest as wicked, and its spokesmen were prone to treat the theological controversy of the Protestant Reformation as a cloak under which covetous men sought to get rid of this major prohibition.[13] We know how this prohibition was qualified and refined, distinguished and modified, until usury came to mean, instead of any interest, an oppressive form of interest.

The Church saw no difference, and the most modern legislation sees no difference, between taking advantage of a man's necessities in a money transaction and doing so in

one that involved goods. There is, however, the difference already mentioned, that to-day there is little opportunity to do so in the latter case, but in the former special needs and immediate urgency are often enough present. Anybody can buy goods for cash. Not everybody can buy a present sum of money for a promise to return a larger sum at a later date. And people often have such need of doing this that they will make their promises larger and larger.

It is their own fault that they do so and their own fault that they do not clearly foresee how difficult it will be to pay at that later date, but if the promise is very improvident, it will probably be permanently impossible to persuade the majority of people that there is not something inherently immoral in the transaction. It is obviously a case in which the thrifty take toll of the unthrifty, and while unthriftiness is doubtless a vice and thrift is certainly a virtue, it is not an engaging virtue and the

other is not ordinarily a repulsive vice. At any rate, since there are pretty sure to be many more borrowers than lenders, the borrower-psychology will determine the public attitude and that psychology is apt to express itself in emitting loud cries when promissory notes fall due.

The law has followed the popular conception in the matter with somewhat strange results. Among the Greeks, traffic in money was all but universal.[14] Whatever else a man did, he also did a little business on the side, and if he had money, that business was as apt as not to be lending money at interest. The one official exception was Sparta, to which I shall recur. That this does not stand out more prominently in our historical manuals is due to the fact that both Plato and Aristotle were opposed to lending money at interest, and Plato and Aristotle play a part in determining our conception of ancient society out of all proportion to the influence they exercised in it.[15] Plutarch, too, wrote a

diatribe against money-lending,[16] and his homiletic essays were widely read in the Renaissance. But the general feeling of Greeks, as indicated in almost all other sources, was that the practice was a morally unobjectionable, indeed, a commendable, source of profit.

Of course, oppression by money-lenders was a grievous abuse in the history of Greeks as of other nations.[17] Compound interest, interest at enormous rates — twenty and thirty per cent let us say — lending under onerous conditions, all that was bitterly resented and was a fertile source of social and political upheaval. But we do not hear anywhere in Greece of any law prohibiting or limiting interest, although laws forbidding certain ways of collecting it were common enough.[18]

The one exception, as has been said, is Sparta, where a unique legislation sought to prevent, not merely money-lending, but money itself except as a means of exchange.

We may say at once that the legislation was a complete and total failure. Spartan kings and private citizens deposited abroad the silver and gold they forbade themselves to keep at home, and by the time of Plato, Sparta was the richest as well as for a while the most powerful Greek state.[19]

The opposition of the Greek to excessive interest was fluctuating, and it was never maintained long enough to demand legal sanction. Democratic waves might, as in the famous case of Solon, secure total or partial discharge of all debts, but there was no tendency to make the situation complained of permanently illegal.[20]

Perhaps the Greeks were, after all, too realistic or too cynical to go through the motions of forbidding what was so fixed in men's habits. Those most untypical of Greeks, the Spartans, did so with the inevitable result we have noticed.[21] And how justified Greek practice was, may be seen from the example of the Romans.

The Romans early proscribed money-lending for profit.[22] Not excessive interest, but any interest, quite in the manner of the medieval Church. This was apparently in 342 B.C., when Rome was rapidly regaining control of Central Italy. Cato, we may remember, thought that a merchant was a dubious citizen, but he was sure that a man who lent out money at interest was twice as bad as a thief.[23] However, even in his own days, about a century and a half after the prohibiting statute, that statute was already a ghostly survival of a virtuous Golden Age. Money was freely lent out, and Cato himself in his latter years stretched his principles far enough to uncover the case of lending money on ships, the most profitable of all forms of usury.[24] And within the next few centuries we find money freely and openly lent in every form which ancient society knew. Not only that, but custom had established a maximum, twelve per cent, beyond which interest was extortion, although the usual rate

was below twelve.[25] We have accordingly the spectacle of a definite statute quite generally and peaceably disobeyed, a condition, of course, wholly unknown in later and happier times. In the Empire there was a renewal of legislation, rather as to remedies for usury than in relation to the maximum, and the matter was finally regulated in detail by Justinian.[26]

Even the more liberal rule was so commonly and readily evaded that we can scarcely suppose more than a half-hearted attempt was made to enforce it. Doubtless if there had been any considerable middle class which suffered under usury, the complaints voiced by contemporary literature would have known how to make themselves effective.[27] It was apparently the very poor who were most directly and widely concerned, if we may trust the somber picture painted in such detail by Saint Ambrose.[28] It may be that the preponderance of men of these groups in the early Church created

that intensity of hatred toward interest on money which so definitely marked Christian pronouncements on this matter.[29]

However this may be, the elaborate and complicated efforts to regulate interest legally at Rome, the failure of all of them certainly indicate that the Greek communities were well advised in never attempting what so secular an experience has since proved practically impossible of achievement. This is further borne out by the history of similar regulations in England, a history often written.[30] The canon law, the common law, and specific statutes piled up mandatory injunctions, first, against all interest, then against special forms of it — as we know — without effect — at least, with an effect as the Lawyer explains in the Elizabethan dialogue on Usury,[31] quite opposite to the one intended. When English law finally accepted Benthamism in this as in other things, and completely abolished usury laws in 1854, there was an additional

experience to set beside that of Rome, longer than Rome's and more varied.

The abolition of the usury laws in England has not made usury respectable or popular. It has not even made it quite legal, because the courts have in part undertaken the task which the statutes have declared themselves unable to perform. Whenever a loan is made under such circumstances that it is oppressive to enforce it, the English courts will not do so, but evidently it is only in extreme cases that they will decide that it is oppressive. But far within what it is so oppressive that the court will have nothing to do with it — in Jeremy Bentham's despite — there are the loans which in popular feeling are oppressive, for no other reason than that a needy man has had to meet the hard terms of a wealthy man. It is quite true that scarcely any modern Englishman sees anything unnatural, wicked, or immoral in interest as such, but it is equally true that to take all that the traffic will bear in money-

lending will never seem justified morally to the majority of any considerable population.

England, and Germany, especially since the Code of 1900, are isolated examples of countries without a fixed maximum of interest. A number of American States — nearly all in the West — were until recently in the same situation. In England and Germany the reason was apparently the futility of the restriction. In the Western States it seems to have been the need of tempting capital by advantageous terms.[32] But California, as one of these Western States, has within the last fifteen years introduced the fixed maximum and has strenuously tried to enforce it with abundant difficulty to the enforcing mechanism.[33] What its ultimate success will be remains to be seen. New York and most Eastern States with drastic regulations on usury have been compelled to make numerous exceptions and have scarcely contrived to master all the evasions which the stronger

party in the money bargain can resort to by the very fact of his strength.

We may say that in the main the law has, perhaps overhastily, offered its sanctions to prevailing popular morality in regard to trafficking in money. And it has had the somewhat rueful experience that its sanctions were found to be of extremely little value. What the economic causes are for this failure, the economists no doubt can readily discover. Perhaps as long as there is a type of money which has universal currency, it cannot by either morals or law or by both combined be made into anything else than a traffickable commodity. And if it is such a commodity, it is probably true that there can be no *justum pretium* — even in the modified sense — for its use. The organization of modern industry has made that fact of little moment in ordinary merchandise. Perhaps changes in the organization of our financial system will make usury of as little serious account.

CHAPTER III

LAW AND THE DISHONEST VENDOR

THE duty of telling the truth is a moral obligation. It has been held on high ethical authority that it is not absolute, especially when those who violate it do so with an altruistic motive. But it would be a little difficult to find ethical authority for a statement which is at the same time false and self-serving. We may take it for granted, therefore, that a seller of merchandise who lies about its qualities, in order to induce a buyer to take it, is beyond question guilty of a moral wrong.

It must accordingly startle us a little to find courts — by no means long ago — saying of certain acts that they were "mere naked lies" and not enough to justify the interposition of a court.[1] Or that fraudulent intent and false pretenses were of themselves

not quite sufficient to make a legal wrong. Perhaps it will not startle us so much, if we discover that many of these things were said in criminal cases, where we may approve of leniency, or, better, where we should object to using prisons for collecting debts.

But when a buyer, who has been induced by a lying statement to purchase an article, is told that the lie was legally unobjectionable, that may well give us pause. And there is no doubt that the attitude of the Common Law — our law — has for many centuries been that most lies uttered by the seller are venial enough and certainly will not justify the buyer in throwing up the contract. A great many conditions were made. It must have been intended by the seller that the lie should be believed. It must, in fact, have been believed and the buyer damaged thereby. It must have been a serious lie, a lie concerning a serious element of the contract — a good round whopping lie. It must not be something which could be made to seem a matter

of opinion. It must not be a matter about which the buyer had equal opportunities for information. It must not be something which could be called mere "puffing," "seller's talk," "trader's commendation," and other euphemistic expressions. If all those conditions were satisfied, the court would solemnly find that fraud had been perpetrated and the buyer could rescind.[2]

I am afraid that in this we have let go of the bottom degree of the moral staff and are sinking to the level of the very deepest groan of the bass-viol. All these conditions are conditions under which a deliberate and selfish lie — a concededly immoral act — is by law enabled to be not merely unreproved, but prosperous. How is that to be reconciled with the least regard for that connection between morals and law of which so much is made in words?

The Common Law had its explanation ready. The trading gentry stood almost always on quite equal terms. These men dealt

"at arm's length." The seller was doubtless no worse than the buyer. If the one over-praised his wares, be sure the other disparaged them. Surely men in business knew how to take each other's expressions and if they were inexperienced simpletons, no one forced them into trade. If there was no conspiracy, no false weights and measures, why should a man lose his bargain because of a few words? [3]

I may say at once that the situation is not really so bad as that. The law has long ago pulled the reins far tighter than was the case a few generations back. As far as the Civil Law was concerned, that had derived from the Roman Law an idea of fraud, of *dolus*, which made short work of most of these conditions and qualifications. A deliberate lie was fraud, and any planned attempt to induce the buyer to misapprehend what he was buying or the conditions under which he was buying, was fraud.[4] And the Roman market commissioners, the ædiles, had scant patience

with most of the sound commercial reasons why a lie was no great matter in a sale.[5]

It must be confessed that even the Roman ædiles and the Roman prætor thought that some latitude should be allowed to an enthusiastic vendor, but it was a latitude far more limited than that of the Common Law, as the Common Law remained till well toward the end of the nineteenth century.

But honesty is not merely a matter of truth-telling. It is also a question of discreet silence. It may be that the parties of the sale normally deal at arm's length, but the arm of the vendor is in at least some cases appreciably longer than that of the purchaser. He has the inestimable advantage of having been for some time in possession of the goods. He may have learned much about them. How much of this must he tell?

Well, even the strictest morality will hardly require him to publish all the defects of his merchandise by the town crier. But it does seem that he ought to say something about a

peculiar knock in the engine to an intending purchaser. The Roman Law very early settled the matter thoroughly and completely. It made no difference whether the seller disclosed all he knew or not. Unless he specifically sold the thing as it was, he was responsible if it turned out not to be what a reasonable man would expect and he had better square himself with the buyer as promptly as might be.

That is a high standard, higher perhaps than Roman practice. It is curious that Saint Thomas Aquinas asked less than that of a vendor and suggested a number of cases in which defects might be concealed, although it was a little better to disclose them.[6] But the Civil Law clung to its doctrine that the vendor must see to it that the thing was what it was supposed to be and there is no Continental legal system which would accept any other rule.

The Common Law was somewhat tougher-minded. Having in contemplation two men

equally able to take care of their interests, it grimly bade them fall to and let the better man win.[7] We take as an example the historic case of Chandelor *v.* Lopus, decided in the Exchequer Chamber at the very beginning of American colonization.[8] Chandelor had bought of Lopus what the latter called a bezoar stone — a piece of organic resin derived from the East and credited with medicinal and magical properties. For this he paid one hundred pounds, which was at that time the yearly income of a gentleman. When Chandelor took it home, it turned out not to be a bezoar at all. The court held that as Lopus had not used the word "I warrant it," Chandelor was a fool for his pains and was out at least one hundred pounds.

Now it is to be noticed that the King's Bench had found for Chandelor and one of the Barons of the Exchequer was also of the opinion that the action should lie. They may have done so because they felt that fraud had been present, but at any rate it

seems clear that, at the beginning of the seventeenth century, if a man wanted anything very badly, he had to be wary. If he wanted a bezoar stone, he must ask the vendor to warrant that it was so. It took some two centuries to get rid of the magic word "warrant," and it still is the case that you must get a positive statement of fact from a seller that a particular quality is present before you can assume anything about it.

This is summed up by a famous Latin phrase which is, next to "habeas corpus," probably the best-known legal expression among laymen, the phrase "caveat emptor," translated "Let the buyer beware." Because it is supposed to be Latin, an astounding number of persons, including a few American judges and the late Anthony Trollope, spoke of it as Roman.[9] Let us keep in mind that, so far from being Roman, it is bad Latin, and, from the Roman point of view, worse law.[10]

It has occasionally been said that it was extraordinary for an honest people to bear so long with so dishonest a rule. That the rule is dishonest, there ought to be little doubt and the astonishment seems to me to be warranted. But Englishmen and Americans have borne with it, and, in mercantile transactions, the only qualification was that, in general, the practice of business men was better than the law they insisted on having maintained.

This is changing. Courts are becoming more definite in regard to fraud in contracts. "Seller's talk" is reduced to smaller and smaller proportions. And the rule of *caveat emptor* has been very appreciably modified by legislation and by court decision, and also somewhat by the fact that competition for foreign markets brings us sharply against a mass of moral judgments differently developed and differently formulated from our own.[11] *Caveat emptor* may have had something to do with the fact that before the war

German goods were successfully crowding out our goods in South America.

In the United States, the local merchant is diminishing in importance if not disappearing. Even when he keeps his shop and does not become a link in a chain store, he sells relatively few things that he knows anything about. His goods, whatever they are, come in packages sent him by distributors, who control the local markets for nationally advertised products. The local dealer, therefore, is really under no temptation to lie about his goods. The labels on them will lie for him.

Advertising is a business.[12] There can be no doubt about it. I suppose the mere equipment and budget of advertising establishments runs into tens of millions a year, and surely the amount of money spent yearly in advertising must run into billions. To advertising in itself, its effects and economic utility, I shall briefly refer later. For the present, let us consider this relatively modern

fashion of salesmanship in its relation to the elementary moral problem of honesty.

It is said that the English Quaker, George Cadbury, advertised the Cocoa from which he created a fortune for his family, without pictures or devices and without commendatory adjectives or descriptions, simply by the words "Cadbury's Cocoa." That is certainly not the way other things are advertised nor the way Cadbury's Cocoa is advertised at the present time. But if the story is true, this may be said to be advertisement in its simplest form. It calls attention to what is offered and no more.

As has been said, most advertisement is not like that. The purpose of advertisement is not to call your attention to the commodity and then to leave it to your own judgment whether you will buy it or not, but to exercise some coercive force upon your judgment, to wheedle it, surprise it, overwhelm it, or, at the least, persuade it, and it has not been found, in spite of the successful example of

Cadbury's Cocoa, that the matter can be managed among us without a deal of self-laudation.

Now, self-laudation may not be immoral, although it is scarcely good manners. Humility is, to be sure, a moral virtue, and is declared, by the accepted creed of the prevailing Western religion, to be one of the characteristic virtues of that religion. However, we have agreed that we shall not judge of business ethics by quite the loftiest standards, and that we shall content ourselves with qualities which would make no impression on the Congregation of Rites in proceedings for formal canonization. We shall, therefore, pretermit any allusion to the fact that there is something like indelicacy in descanting on one's own merits and confess that gentlemen, who would not boast of their family or their wealth, will brag unashamedly of their cigars or their dogs. Why may not merchants, who imperatively must sell their goods if they wish to remain merchants, do as much?

Ben Sira, we may remember, did not say, as Aristotle and Plato did, that a merchant could not possibly attain the highest excellence, but merely that he would find it difficult to do so. If merchants in his day had used our advertising methods, he would have been confirmed in its dangers. It may be doubted whether more than a minute fraction of the advertisements in existence have nothing further to reproach themselves with than a little blatancy of self-satisfaction. We may say with all moderation that the statements made are not always literally true, are sometimes very far from being true in any sense. And truth, it will be admitted, is more than manners or propriety.

The temptation certainly is extremely great. Advertisement is a matter of competition. If Jones's Sarsaparilla cures three diseases, it will go hard but that Smith's Compound will cure four. And the temptation is increased by the fact that those who believe neither Smith nor Jones are apt to look

at this sort of emulation in mendacity with an amused smile.

In this respect, the law has recently got somewhat in advance of popular morality. It was not disposed to look upon such statements with an amused smile. If, as Mr. Bumble asserted, "The law is a hass," it is at least a solemn ass and does not see the point of some jokes. A certain latitude is, of course, allowed to "puffing." A man may call his goods "The Best" or "The Finest," even though they are not the best or finest, and it is not supposed that sensible men will take these words seriously. But if specific statements are made and they are false, that generally is now called fraud and any one may claim the resultant damages.

And again it can hardly be alleged that the marked changes which have come in this particular matter have been produced by an uncoerced development of mercantile honesty. The vigorous agitation which was directed a generation ago against misleading

food and drug advertising was successful, but it convinced legislators and courts without having affected popular feeling to any great extent. It is a curious fact that men still buy preposterous patent medicines in the vague hope that they possess powers which the manufacturers dare not openly claim for them. And the courts are apt to be insistent that, in this particular field of advertising, the statements shall not merely be approximately true, but quite strictly and literally true. Even Lydia Pinkham was taken seriously by these humorless persons on the bench.

We must admit that in other matters the courts have dealt with truth somewhat less precisely. If a lubricant is advertised as "oil" and is composed of only seventy-five per cent of oil, is that a serious falsehood? The majority of the court, in New York, etc., Lub. Co. *v.* Young,[13] thought it was not. If clothing is advertised as the manufacture of a company, when as a matter of fact not

more than ninety per cent is so manufactured, is that an objectionable falsehood? The New Jersey Vice Chancellor, in the case of Hilton *v.* Hilton,[14] allowed himself to say "No," and declared that "It makes no difference to the public by whom the goods are manufactured so long as the public is satisfied with the article it gets." How, under modern conditions, public satisfaction or dissatisfaction in such matters is expressed, the learned Chancellor did not inform us. Again, when Monsieur Coty of Paris began to sell the perfume he calls *L'Origan*, the question arose as to whether he might rightfully so call this highly profitable concoction. The court learned, as many of us might have done, for the first time, that "origan" or *origanum* was "a genus of labiate plants of the tribe Satureineæ and the sub-tribe Menthoideæ." It was admitted that the ingenious Monsieur Coty's product did not contain the remotest suggestion of the true *origanum*, distilled examples of which were literally pressed under the

court's nose and declared by the court to smell like turpentine. But the court decided, and the upper court sustained it, that the public did not know anything about the genus of labiate plants, and that Monsieur Coty's departure from truth, if he had departed from it, was irrelevant.[15]

In other cases, however, the courts have taken a man's statement more seriously. In 1921, a Rhode Island baker instituted a bread-making contest among the women of Providence, Rhode Island, and announced that the prize-winning loaves would be analyzed and a bread baked as a result of this analysis would be marketed as "Liberty Bond" bread. As a matter of fact, he kept making bread on his older formulas in the old fashion. The court, in the case of Gen. Baking Co. *v.* Gorman,[16] decided that he had been guilty of a culpable falsehood and would receive no protection from the law if another man infringed his trademark. And yet, if we applied the Vice-Chancellor's test in the New

Jersey case, the public may have been satisfied with what it got.

It is accordingly not easy to be sure what attitude the courts by themselves would have taken toward the process of making advertisements conform to reasonable standards of veracity. There is a marked vacillation. The New Jersey case represents perhaps the lower reaches of legal morality. When Lord Westbury, in the case of The Leather Cloth, made the statement, "If there is a wilfully false statement, I will not stop to inquire whether it is too gross to mislead," [17] he may be said to have risen to a little higher position. But it cannot be asserted that the English courts, any more than the American, have always been definite and consistent in their dealing with this question. Sometimes a Spanish look and a Spanish address and the word "Habana" on a cigar box have been called "an elaborate concatenation of pictorial lies," and sometimes they have been disregarded.[18] And it is curious

to note in this connection that "California Syrup of Figs," which uses fig juice solely for flavoring and otherwise is innocent of any connection with figs, was declared by an English court not to be improperly described [19] — or at any rate not to be too improperly described — while the United States Supreme Court found the name to be false and fraudulent.[20]

But in all probability the highest ground taken in regard to truth of advertising has been that of the Federal Trade Commission. This extraordinary and admirable tribunal was created by an Act of Congress of September 26, 1914, at almost exactly the same time as the Clayton Act, and its creation was part of the renewed movement against mergers and consolidation — in other words, against monopoly, which is still popularly and legally anathema.

The function of the Commission is to prevent unfair competition, but the "unfairness" is not conceived, in the sporting sense

of the word, merely as an improper advantage taken by one competitor of another. The Commission need not wait for a complaint on the part of an injured contestant; nor even for one on the part of a consumer actually deceived by the practices of a particular person or company. It may of its own motion investigate, hear, judge, and secure through the court the enforcement of its decree. And the striking character of its action is that it does not concern itself with punishment for past misdeeds. It is directed to the future, and its orders contain the commands now dreaded by dubiously honest business throughout the United States — that such business "cease and desist" from certain practices which the Commission deems improper.

One of its earliest orders dealt with truth in advertising. A well-known company advertised by circulars its teas, coffees, and sugars, and the statements about these products were couched in highly colored

phrases. The teas, said the circular, had a pronounced yet delicate tea flavor with an appealing fragrance. The company had a special representative in Japan who personally visited tea-gardens and took only first-crop pickings from upland soil. Similarly the company's coffees were upland coffees — fresh, savory, and fragrantly tempting — the pick of the crop from the greatest coffee regions in the world. Again, it bought sugar in such huge quantities that it paid less than others and could therefore sell it for less.

This colorful romance, with its emphasis on "uplands," was probably written by some man or woman who had won deserved distinction as a writer of advertising copy. It had many merits, but truth was not one of them. The company got its teas, its coffees, and its sugar where any one else might have got them and for the same price. The Federal Trade Commission ordered it to cease and desist from fantasying in its circulars about upland hills which grew fragrant

teas and savory coffees — and the United States Circuit Court sustained the order.[21]

And yet it is doubtful whether much of the coffee, tea, or sugar sold by the company was bought because of the statements made in the circular. If the circular was read at all, it was probably read for its literary merits. The commodities were purchased as those of that particular company and valued as such.

The standard set by the Commission is indubitably a good standard — a better standard than courts of a generation ago were willing to adopt, and has in the main secured the approval of the United States Courts and exercised an elevating effect on the State Courts. To be sure, some business men and some lawyers have been a little restive. So in the case of the Chicago Portrait Co. *v.* Federal Trade Commission, the majority of the court overruled the Federal Trade Commission.[22] The case was one in which a company offered to draw a portrait of your grandfather from a photograph and

sell this priceless masterpiece to you for a small sum if you were lucky enough to get a winning number. Everybody got a winning number. The minority of the court, in a briefly contemptuous opinion, declared this to be a mild sort of fraud and one that was properly enjoined by the Commission. The majority took refuge in the fact that no competitor was injured.

But the trend of the decisions is in favor of the Commission. In a very recent case, a manufacturer called his product "English Tub Soap." He did not say it was made in England and the words are intelligible in a different sense. The Commission and the court, taking regretful notice of the fact that there is a general impression — doubtless wrong — that such soaps are better made in England than here, found that the suggestion was false and misleading and permanently prohibited it unless the soap was in fact of English manufacture.[23]

It may be well to remember that this type

of legal sanction is quite different from the remedy for fraud. It is always open to a consumer who has bought an article because of a false description to rescind his purchase or to obtain damages. And this might be done without any reference to the Federal Trade Commission. But in such a case the complainant must show that he relied on the description, that it was knowingly false, and he must estimate in money the amount of his damage. The damage is likely to be small and the trouble likely to be great. Such a procedure as that of the Federal Commission, with its formidable "Cease and Desist," goes to the heart of the question and can apply a moral test of truth that is on a plane distinctly above the ordinary business one.[24]

I do not believe that the Federal Trade Commission, or the courts either of the United States or of the separate States, will succeed in compelling all advertisers to say no more in their public announcements than they could prove to be literally true. It

may be that if this were done every advertisement in the world would read like that of Cadbury's Cocoa, perhaps with advantage to the advertising budget of many business enterprises. I merely wish to point out that the courts at their best are somewhat in advance of the popular conscience in this matter, since, in advertising, the wildest flights of hyperbole are apt to seem to most people a venial offense, if so much as that.

It is quite probable, however, that the standard set by these legal bodies indicates a direction in which there is likely to be no violent turning back. A casual glance at newspapers or magazines shows that there are fewer things said in the advertising columns which are plainly not so than was the case a generation ago. But neither in law nor in business ethics has the advice of Proverbs been much heeded: "Let another man praise thee, and not thine own mouth; a stranger, and not thine own lips." [25] The manufacturers of dentifrices and automo-

biles, of cigarettes and washing machines, prefer to praise their wares with their own lips and thus indirectly praise themselves. Indeed, it is not always done indirectly. We can without difficulty recall cases in which advertisers unmistakably show that they have a high opinion of persons who like themselves have enriched the world with such excellent commodities.

Good manners, certainly, the courts and the Commission have not instilled into advertising, and one cannot claim even that the law exercises a categorical compulsion on advertisers, to keep at all times within the limits of soberly scientific description. But something has been attempted and the law has quickly enough sanctioned the effort, and has made the sanction at least partially effective. When it shall have done so completely, the millennium of advertising ethics will not be more than a thousand years away.

For to tell nothing but the truth and to omit laudatory adjectives may be the begin-

ning of advertising morality, but it is not the end. There are those less obvious forms of falsehood which in casuistry and in law are called the *suppressio veri* and the *suggestio falsi*, concealing the truth and hinting a lie, methods which certain types of advertising have carried to a pitch of skill and success that leaves us breathless.

Illustrations crowd on us. A famous soap, which almost elected a President of the United States, made its reputation by advertising that it floated. Why should floating be a saponic virtue? Chemists have told me that it is not, but on the contrary a vice, and that good soaps ought not to float. I hasten to withdraw myself from a controversy in which my incompetence would be glaringly evident and merely state that no reason was ever presented why floating made this soap better than its rivals; but a general impression was indubitably created that floating was a mark of high quality. That this was done deliberately can scarcely

be doubted and, if floating is no such mark, I am afraid that over-rigid moralists would have found in the statement more than a trace of *suggestio falsi*.

A negative form of this device has had an unforeseen reverberation. For a full generation a certain baking powder was advertised as composed of cream of tartar and totally without phosphates. The insistence that phosphates were absent was made so much of a virtue that housewives must have shuddered when the word "phosphate" was uttered. Now, in very recent years, cream of tartar had got to be extremely costly and the company began to market a baking powder which it was forced to describe as "a phosphate powder" because it was one, and the Food and Drugs Act is unfortunately specific. It found that the bad reputation it had itself created for phosphates appreciably hindered the sale of the new powder. It attempted to overcome this difficulty by a trick more ingenious than honest which the courts

incontinently stamped on,[26] and the salesmen of the baking powder in question are probably engaged to-day in explaining that there are phosphates and phosphates, and that some are thoroughly respectable.

But we may go further. Advertising has become an art, a science, a psychology, and a philosophy. Books are written which bear all these titles.[27] I suppose in all these books it is declared that truth is the primary virtue in this field and that no departure from it can be condoned, although truth is not always prescribed in a supersaturated solution, much less to be taken neat. But there is an insistence among even the professed psychologists of advertising on catching and retaining the attention and arousing the interest of the public, which has a perilous similarity to the training received by the Artful Dodger. When a benevolent old gentleman is invited by an affable stranger to look up at a new kind of airplane passing, the affable stranger may be interested in a strik-

ing aerial phenomenon or he may be trying to pick the benevolent old gentleman's pocket. It is an ambiguous device, this solicitude to gain a man's attention.

Now, the theory of advertising, on what seems to be its highest plane, is apparently that if we can induce a man to listen to us long enough, no matter how we get him to do so, he will buy our goods whether he wishes to or not or whether they are worth buying or not. We must put him in a purchasing frame of mind, or, better, we must prepare him to act in our favor, when he gets us into a purchasing frame of mind, as at some time he must. He will then buy the commodity in regard to which he retains the most vivid and pleasant picture, although the commodity itself was but an incident in the picture. Or else he will remember a slogan which amused him and he will buy the goods sold by a man clever enough to select such a slogan. The writers of books in the psychology of advertising have evidently no flatter-

ing opinion of our intelligence, and the humiliating fact is that they are apparently right or else all Americans would not at one time have been eating powdered scraps as breakfast food or be still buying lots on a sandy waste upon which a supersalesman has conjured the cloud mirage of a metropolis.

In other words, it is taken as axiomatic that the purchase of wares may be properly stimulated by means that have no connection with the qualities of those wares. The amiable optimist who has thrilled successive generations with the sentence, "Make a better pair of shoes than another man and the world will beat a pathway to your door," has evidently mistaken what he meant to say. It ought to be, "Get the world to beat a pathway to your door on some other pretext, and you can sell it anything."

That this arouses no moral indignation must be evident. And if there is no fraud or misrepresentation, the law will do nothing for a man who has bought what he does not

want because he liked the literary style of the man who sold it. But if we should ever reach the point at which mercantile honor will reject, first as an impropriety and then as an immorality, the doctrine that the qualities of an article are a secondary consideration in the process of marketing, the law would find no difficulty in suggesting a means of enforcing a better rule. If there were an interval of repentance in every bargain not completely executed — subject to reasonable compensation on both sides — it would be more difficult to beguile men into purchases with which a rational buyer would not be satisfied. The law of Continental Europe has almost reached this attitude toward many bargains, though this development has come from other sources than abuse of advertising.

One of the difficulties which advertising entails is the pressure of its example. It is not merely the emulative suggestion by which a dealer is tempted to go his competitor one better. It is taken to be almost an admission

of demerit if merit is not excessively asserted. I remember a great school system in which the teachers had originally been classified as *Poor*, *Fair*, and *Good*. The desire of extolling certain favored members created the grades of *Very Good*, then *Excellent*, then *Superior*, and perhaps by this time they have got to *Superfine*. At any rate, some time ago a teacher who was marked merely *Very Good* would be dismissed as incompetent. So it may be that an automobile manufacturer who described his car accurately and published only actual photographs of it would be supposed to be admitting that it was a poor contrivance, scarcely worth the cost of the materials. "If you want cream," said an editorial writer in an American weekly, "you must ask for Extra Special Grade A Double Cream. That means cream."

There is a limit imposed by our Occidental nature. A Chinese traveler once informed me that in his home he would say to a guest, on pressing a cup of tea upon him: "Shall I

be pardoned for venturing to offer you this wretched tea, wholly unworthy of your consumption?" Morals, with law following or preceding, may some day bring us to the Cadbury system of advertising. We shall probably never go all the way to the Chinese method.

CHAPTER IV

LAW AND THE UNFAIR COMPETITOR

MERCHANTS in medieval society formed a class and a class meant a definite and semi-religious organization or group of organizations. The members were bound to each other by solemn pacts and oaths and had toward outsiders certain precise responsibilities. No one professed that the duties toward each other and toward outsiders were the same. If merchants maintained a double standard of conduct, it was at least an openly and frankly acknowledged one.

The double standard still exists among merchants as among other professions which had in medieval times a similar organization. There are rules which are applied to members of the gild in their relations to each other; and other rules which govern the relations of the members to everybody else. In

fact, the term "ethical" has got a special meaning in these cases and primarily denotes the former group and not the latter.[1]

This division also corresponds to the two aspects of business ethics which still vitally concern us. Business morality at the present day is exhibited in the restriction of competitive practices and in the protection of the consumer. What may a merchant do or not do in securing a customer whom another merchant desires? What may a merchant do or not do in inducing the customer that he has secured to pay the price asked for the goods? What the law has had to say on the latter subject we have considered. We may now turn to the legal attitude toward competitive practices.

Competition may be, as some have said, the soul of trade.[2] It also is the mother of many devious devices which indicate that this soul has much that is fleshy and earthly clinging to it. And further, if it is the soul of trade, it is a relatively new soul, since in

medieval times the essential characteristic of a merchant was that he possessed a privilege which strongly savored of monopoly.[3] Those persons accordingly who see in restriction of competition a transgression of the immemorial rights of Anglo-Saxons will do well to remember that it is a bare four centuries since competition was reluctantly accepted as an evil if necessary incident of the process of trafficking in commodities.

But, however recently established, the sanctity of the competitive system as such is, at the present time, very much of a dogma with a majority of business men, and this is still the case despite the serious difficulties it provides for those who attempt to reconcile their dogmas with their conduct. It is equally a dogma for the law, where restraints on competition are treated as severely reprehensible, capable of avoiding contracts and accomplishing other legal confusions. We may then properly ask ourselves what the ideal of this system is; what standard of

morality business requires in this matter of competition, in order to be able to see how far deviation from it is permitted either by ethics or by law.[4]

There is little doubt about the ideal. It is the ideal of sport — a fair field and no favor. But it is, after all, not completely the ideal of sport, since there are no handicaps; the lame, the clumsy, the old, start from scratch with the fleet, the agile, and the young. And if the victor owes his success to his sound body and supple muscles more than to his skill and training, there is no doubt that he is entitled to it.

The ideal is still more plainly that of sport in that it accepts no excuses. The victory may be won by a lucky accident, the condition of the track, the wind blowing from a certain angle, the temporary indisposition of a rival. None of these things are considered, and the man who first breaks the tape properly claims the award.

Both the sporting and the business ideal

demand no generosity on the part of competitors, though they may applaud it. And success in either case is consistent with a great many moral defects of a wholly different type. The winner in a race need not be kind, or grateful, or considerate, or delicate, just as he need not be handsome or well-connected. In fact, he may be vicious and profligate, provided he does not thereby completely undermine his constitution and lose the power of submitting to training when it is called for. But there are two distinctly moral requirements which are made of him. He must not actively prevent any one from competing, and he must not foul.

We shall do better, I suppose, if at least for a while we abandon our analogy and confine ourselves in terms as well as in spirit to business competition. Two tailors open shops in a street that will comfortably support only one. Obviously, it would be highly advantageous for either if he could eliminate the other. He must not kill him, assault him,

blow up his shop, threaten him, or slander him. That has nothing to do with competition. He must not do these things, ethically or legally, to anybody, whether he is a competitor or not. The legal sanctions which are directed against these acts did not grow up in this connection and do not find their chief illustration here. And obviously no man will be heard to defend immoral and illegal conduct of this sort by pleading that he was impelled thereto by the success of his rival. All certainly is not fair in business.[5]

How far may he go? May he play on his rival's fears or ignorance? May he persuade the man's landlord not to renew his lease? May he bribe his competitor to withdraw? May he ruin him by "cut-throat competition"? A conscientious man will not do these things, but there is a business conscience as well as a private conscience, and if folklore and popular literature are to be believed, these devices do not always arouse any great

vigor of reprehension. To get rid of a competitor by schemes short of force or threats or patent fraud has not infrequently seemed an example of clever strategy, even when the cleverness must dispense with the approval of professional moralists. And we must remember that the judgment of moralists on this question is not quite uniform. The doctrine that the end justifies the means has few formal defenders, although it has many practitioners. And there are certain approximations of this principle which are difficult to refute. It is largely a matter of just how good the end is and just how bad the means. Suppose the arrival of a competitor means that two men will have a bare or an inadequate livelihood where one man would have had an ample one. May the one whose living is threatened defend himself by the measures I have indicated? I am not sure that Socrates or Aquinas or Herbert Spencer would have said "No," though possibly Kant might have done so, and I think the general public

would approve of self-defense, even by desperate means.

As far as the law is concerned, it has found some of these situations a little difficult to deal with. When one man has frightened off a competitor by a planned scheme which avoided direct infraction of the law, the wrongs complained of were usually too vague for redress. But there were other occasions in which the acts were clear and definite enough. The courts were early faced with the question of whether a man can be bought off. In the upper reaches of finance, it is called consolidation; and in the case of small retail establishments, it takes the form of purchase of good-will, buying another business "out" rather than "off." As to the propriety of such contracts, the post-medieval law was extremely dubious. To allow them freely made monopolies possible. To forbid them wholly restricted somewhat freedom of action. Or, better, it allowed a man to receive value for a promise and impudently break it.

Which is open villainy not to be borne on pretext of public policy.

So, in a famous eighteenth-century case in England, it was decided to be reasonable in the matter and to make it possible for a man to withdraw from competition with a specific person, but not from all competition in a particular field.[6] The courts obviously did not contemplate the situation in which business is done on a national or even international scale. An oil producer who promises not to compete with Standard Oil or the Shell Oil Company will be hard put to it to find a spot where he can sell oil without so competing. The courts have never quite made up their minds what they must do in cases of this sort, and they have generally been relieved from such consideration by the fact that in large affairs — tremendously large affairs — economic developments make freedom of competition an academic question.

Buying your competitor out may be

morally indifferent and within reasonable limits is legally permissible. But the situation is altogether different when it is a question of ruining him. Can that ever be morally justified? We must remember the extreme case in which the competitor is an interloper who has no business there, and whose coming is likely to be harmful enough to established traders. Still he does no legal wrong in coming, by virtue of a system which has somehow convinced itself that there cannot be excessive competition in any field. Being there rightfully, may he be driven to the wall by a type of competition that has earned the bloody sobriquet of "cut-throat"?

Briefly this consists in underselling him even at a loss to yourself. This is only feasible if you can bear the loss better than he can — a fact that at once implies a certain superiority in power and makes us doubt the good faith of the plea of self-defense. We, therefore, in ordinary instances have the additional evil of the oppression of the weak by

the strong. There is also frequently enough a violation of local loyalties. A chain store enters a neighborhood in which a small shop has maintained a respectable and useful existence. It is generally possible for the newcomer to drive the other out of existence by sheer superiority of resources, since it obviously can run at a loss for a considerable time. The proceeding is a highly unpopular one, but local loyalties, however much in support of the local trader, will ultimately succumb to the lure of the lower price.

Apparently this is an improper and unethical practice by the judgment of most men. Is it also illegal? It is hard to see how the courts can act upon it, and yet the attempt has been made. The difficulty lies in the fact that the general public receives an immediate benefit from the drastic reduction of prices, even if the benefit is only temporary. And it certainly can be only temporary. When the competitor is safely disposed of, the successful price-cutter will inevitably go

back to a price on which he can make a profit and very likely will recoup his losses.

The Lords Justices of the English Court of Appeal, in the great case of the Mogul Steamship Co. *v.* McGregor, were very emphatic that the practice was legally unobjectionable. "All commercial men with capital," said Lord Justice Bowen, "are acquainted with the ordinary expedient of sowing one year a crop of unfruitful prices in order, by driving competition away, to reap a fuller harvest of profit in the future." [7] His lordship, true to the tradition of Cato and Ben Sira, has sought to make this respectable by encasing it in an agricultural metaphor, but he has really no doubt of its moral inferiority. In substance he is of the opinion, to use his own words, that "competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or other illegalities, gives rise to no action." To hold otherwise, he tells us, would be to "fetter trade," it would be a

"misfortune," it would be beyond the court's power because no court knows what price either competitor ought to charge.

Courts have a way of crying "*non possumus*" when they mean "*nolumus mutare.*" And we may share the court's doubt whether there is always a practical way of fixing what a fair or reasonable price is. But whether courts must, therefore, license the severe egotism, which will deliberately use a large financial reserve in order to ruin a rival, is perhaps another matter.

If courts will not prevent a price war as such, they will occasionally interfere when they find what Justice Holmes has grimly called "disinterested malevolence." [8] There is a famous case in which a banker in Minnesota entertained a grievance against a local barber, and equipped and financed an opposition barber shop which ran at a loss long enough to ruin the object of his ill-will. The court allowed damages because the banker's act was colored by no desire, not even the

slightest, of profit to himself.[9] A touch of rapacity would apparently have purged the act of illegality, as such a touch did in a recent and well-argued case in New York.[10] But a little before the New York case a famous oil company in Iowa, which had been in almost exclusive control of a large district, found that a retailer in that district had purchased oil elsewhere than its proper source. It thereupon opened a rival retail establishment which undersold the other and destroyed it. The court allowed damages. "If competition be war," said the court, "in which everything is fair — certainly the law will not give that doctrine its sanction." [11] And in another Iowa case in which furniture and not oil was concerned, the court was carried almost to the point of lyricism in the ardor of its discussion. "Every man," it said, "has the legal right to advance himself before his fellows, and to build up his own business enterprises, and to use all lawful means to that end, although in the path of his impetu-

ous movements he leaves strewn the victims of his greater industry, energy, skill, prowess, or foresight. But the law will not permit him to wear the garb of honor only to destroy. The law will not permit him to masquerade in the guise of honest competition solely for the purpose of injuring his neighbor." [12]

It is evident that in the oil case the touch of egotism which deprives malevolence of its disinterestedness was indubitably present, but the law as announced by the court declared the act to be illegal none the less, and there seemed to be no insuperable difficulty in enforcing the decision or in determining the conditions under which it could be rendered. However, this Iowa case is isolated. In general it may be said that courts will continue to require as clear an instance as the barber-banker case before they will step in.

It may be said, consequently, that the ethical standard assumed by the court to be good enough for competitors is not quite good enough for a large fraction of the public.

Popular morality with or without economic justification condemns it. And in a measure, popular morality checks what the court has declared it will not or cannot do. The growth of chain stores is one of the most striking developments of retail business methods in recent years. Many of these establishments are quite able to carry out the process of sowing temporarily unprofitable prices in order to drive out competitors. They rarely do so in any systematic way and often their self-restraint is due to a disinclination to rouse the antagonism which such a procedure would bring with it.

And we must not forget that the popular morality which is thus at variance with the law is also at variance with a somewhat more sophisticated morality. Evidently those who can successfully destroy competition in this severe, impetuous, or spirited fashion — as learned writers in law journals have called it — do not consider the practice immoral. Perhaps they distinguish between business

morality and ordinary morality. But it may also be that they feel themselves justified on higher grounds. If we assume a teleological basis for conduct, it is quite possible to urge that the large business enterprises which are furthered by the elimination of financially weaker competitors are a sounder and better form of economic organization for the community as a whole, and that the individual who suffers thereby must be dealt with as one of many casualties in the growth of a better system. We cannot do this, to be sure, and glorify competition in the abstract, but it must be said for the representatives of bigger and constantly bigger business that they do not profess to glorify competition, abstract or concrete.

As far as the law has anything to say about it, it will let a *bona-fide* competitor drive away his rivals by any means that are not in themselves actionable — that is, that would not be a legal wrong if applied to non-competitors. He must, however, be a *bona-*

fide competitor and not be wreaking a personal grudge. But the law has been less concerned with devices to get rid of one's rival than it has with the attempt to impersonate him.

In this our racing analogy fails us completely. It is not customary for a contestant to disguise himself as some one else and in that form win a prize which will be credited to another person. But in business this is so widely done that a whole body of institutions has grown up about it and a great deal of human cunning has been concentrated on effecting it.

That fraud is wickedness and imposture villainy surely needs no proof. And if A dresses up his goods so that they will resemble B's, that is, to say the least, unethical.[13] To the medieval mind, it was "false," "naughty," "deceyptfull." And the falseness and the naughtiness consisted first in the wrong perpetrated on the public in foisting poor wares upon them instead of good, and

secondly in the slander and scandal this created against B. So, in 1391, it was enacted that fullers might not draw and pull Guildford cloth — "which were of good making and of good value and did bear a great name" [14] — because such acts caused "great deceit of the people." Long before that, in 1316, the potters complain of a sale of pots which resemble their own good wares, but are of bad metal. "By which roguery and falsehood the people are deceived and the trade aforesaid badly put in slander." [15] And in 1592 the Privy Council heard favorably the petition of one John Godsall, of Taunton, who was a true maker of cloth, against some four persons who put John's marks on false clothes — "in so much as theire [viz. John's and other true makers'] clothes which heretofore have ben well sold and esteemed of beyond the seas by the deceipt of these badd persons are now greatlie dyscredyted." [16]

The fraud practiced on the public and the injury done the competitor's reputation were

the basis of the jurisdiction the courts assumed and seemed to be the evil element in these practices. When trademarks slowly developed, from proprietary marks and police regulations, into an independent type of property, or something very like property, a new aspect was presented. Suppose the imposture was as good as the thing it simulated? The public may be deceived in its belief as to the source of the goods, but it will not be injured. Nor will the credit of the trademark's owner suffer. It never seems to have occurred to the earlier courts that this was a possibility, and it never seems to have occurred to the four bad men at Taunton to make cloth as good as John Godsall's before they affixed his mark to their shoddy manufacture. Indeed, it is highly likely that they could not have made it so well as his with the best will in the world, although we must remember that our records are apt to be prejudiced in favor of the regularly constituted makers of cloth.

It was through the Privy Council or the Star Chamber that the roguery of these knaves was to get its restraint or perhaps at the insistence of a member of the public who had received trash instead of good Coventry baize.

When monopoly ceased to be the natural state of things, it became a word of the evilest omen, at any rate to the Common Law courts. To protect a trademark created a monopoly or seemed to. It was a long time before English courts were willing to find a property value in an indication of the source of commodities and protect it as such. It is now a matter of course that a trademark will be protected, although courts are still confused and contradictory in their attempts at rationalizing their protection.[17] And how definitely property-like these things have become may be seen from the fact that the Merriam Company values the Webster name on its dictionaries at more than a million dollars, although scarcely a definition is

put in even approximately the same words as Noah Webster used, and the Coca-Cola proprietors estimate that their mark is worth nearly ten millions. To use such valuable goods without the owner's consent cannot be defensible.

And yet what in the older situations may well have been impossible is a not unlikely situation at the present time. The goods masquerading under a name not their own may be as good as those whose garb they assume — indeed, they may be better. The public is not deceived nor the owner of the trademark scandalized — except in so far as the public gets something it has not asked for. The medieval court would have shrugged its shoulders and, unless the Coca-Cola Company was the recipient of a royal monopoly, would have been glad that the King's lieges had a double source of this health-giving beverage. The modern court is quite unconcerned with the question whether the infringing product is good or bad or whether its par-

takers are put upon or not. If a particular mark is the Coca-Cola Company's mark, no one else shall use it, any more than any one else shall use the Coca-Cola's office equipment without its consent.

Can there be any doubt as to the moral choice between the medieval and the modern attitude? If A has earned a reputation, ought there to be any question that B should not get the benefit of it, even if he is willing to do as well as A or better? But what if A has never really earned his reputation, never should have had it, has bought it by sheer outlay of funds, or accidentally acquired it by being first in the field? What if the existence of A's reputation bars a better man from marketing a better commodity? That all this is not merely an academic possibility is evident enough if we remember the huge change that has been wrought in our economic life of advertising.

A trademark is only one of many ways of indicating the source of some particular

wares, and under existing law any method which passes off one man's goods as those of another is unfair competition and legally punishable. In theory and in history the value of a trademark depended on the quality of the goods marked, a quality which will be inferred as soon as the mark is seen. Now, there is no doubt that some famous trade-marks and trade-names became valuable property through a reputation acquired by use and approval, but we can hardly conceal from ourselves that in a great many cases the value of a trade-name is gained by having it dinned into our ears by countless broad-casting stations, flashed into our eyes from innumerable sign-boards, and introduced into our reading between the proposal of the hero and the tremulous "Yes" of the heroine.

Certain investigations, of which the results may have been overstated, have rendered it extremely doubtful whether the success of an advertising campaign and the long-continued use of the advertised product is any guaranty

of high quality or offers the purchaser as reasonable a return for his money as he would get otherwise.[18] It is quite true that this is not generally admitted, and particularly not by advertisers. Nor should I undertake to say that it is possible at the present day to go back to an economy in which advertisement is local and in which the consumer is competent to judge the quality of what he buys by independent tests. But whether that is so or not, the sanctions of the law are demanded and are accorded purely on the plea that property is inviolable however acquired.

We have accordingly a progress from the law, which sought to safeguard honest workmanship and to protect the public against fraud, to the law which prefers to justify itself on the ground of property right in a reputation, whether it is deserved or not. And the difference follows, it seems to me, the difference in the moral judgments which were rendered in the matter outside the law-courts. The tribunals of the sixteenth and

even the seventeenth century still thought of trade as an immediate relation between consumer and producer and were concerned with regulating both ends of it. Business ethics were directed to the creation of sound commodities. Business reputation was valuable in that it guaranteed soundness and, as such a guaranty, a reputation would be protected. And their lordships of the Privy Council, great nobles as they were, took a personal and acute interest in the qualities of the things furnished them. They handled with their own hands the cloth provided for their cloaks and ran an expert finger along the edge of the swords they hung at their sides. They had no mind to be cheated and they did not wish their tenants to be.

That regulation of the medieval and post-medieval sort did not make for freedom would not have troubled them. As late as 1666, Sir Orlando Bridgman, the Chief Justice, said that "A general liberty of trade without a regulation doth more harm than good."[19] And

though the gilds had practically disappeared, the gild spirit was still too strong to make the notion of monopoly in any form either strange or distasteful to those whose spirit clung to feudalism.

Indeed, these very gentlemen of Privy Council and Star Chamber were the chief traffickers and beneficiaries in the more pronounced monopolies which since the time of Elizabeth had become the standing symbol of tyranny and corruption. This incident of English economic history need not concern us particularly, except that it may explain why the law of the seventeenth century — still primarily the utterance of a feudal nobility — found no repulsiveness in an idea which the rapidly growing towns took to be the chief obstacle in their progress.

With the fall of the Stuarts, the sense of a breach with the last remnants of feudalism found expression in the courts. The law was as definitely set against all that savored of monopoly as the opinion of any tradesman

could be. It was because of the danger in this direction that in the eighteenth century the great Chancellor Lord Hardwicke — prone as he was to extend the jurisdiction of the Chancery — declined to give the only effective remedy for the open violation of a trademark. Fraud was not alleged as far as the public was concerned and no legitimate business reputation was in danger.[20]

We may say that Hardwicke's judgment was near enough to what most men at that time might have felt to be right, except those whose marks were thus appropriated. As between the monopolistic powers which a successful trademark might create and the indubitable impropriety of stepping into another man's shoes — while that other man still wore them — it is likely that the choice would have seemed to be between two pretty undesirable citizens with the qualification that on the whole the infringer's misconduct was more conducive to public welfare. At any rate, business men did not grow

restive under this situation till, in the nineteenth century, the new conditions involved in large-scale production demanded access to larger and more remote markets and with it developed a technique of marking and advertising for which the ancient legal sanctions were declared to be inadequate.

That technique has created a new property value which is quite apart from the original purpose of any merchandising technique. It is a value which has been, as we have seen, estimated in terms of millions of dollars. How much of moral value it has depends on how well we succeed in balancing the possible public disservice of advertising against the general rule that to reap what one has not sown is difficult to defend on ethical grounds.

But we have clearly traveled a long way from the merchant gild with its corporate monopoly and its rules of loyal competition among its members. Evidently if the gild notion were revived, it would have to be done on the monstrous scale of a national, or

perhaps international, organization. This has been declared, not only feasible, but to be slowly taking shape. Whether so much is necessary before competition will learn manners and practice self-restraint, we may leave undecided.

CHAPTER V

LAW AND THE FUTURE OF BUSINESS

FOR the evils of competition if there are any, and for all other social defects if there are any, the same remedy is proposed by certain conservatives and by certain radicals. The conservatives call it merger, consolidation, absorption. The radicals call it socialism. The only difference is in determining into whose hands the administration of the no longer competitive industrial organization shall be entrusted. Shall it be a shop committee, or shall it be the present managers and their successors selected by a process of coöptation?

In either case, the profession of middlemen, the merchants, will disappear. There will be distributing agencies of all kinds, but there will be no hagglers or chafferers,

no advertisers and no unfair competitors. There will obviously be no business morality. In fact, business will be essentially immoral and the function of the law will lie in emphasizing this.

This may after all not happen, or it may happen incompletely. At any rate, what looms before us as the immediate economic future of the United States, if of no other country, does not permit us to envisage clearly the end of American industry as One Big Trust or One Big Union. It seems likely that merchandising will continue to occupy the energies of some millions of Americans, and, if competition is economic anarchy, that there will be a number of anarchists about us who are apparently not amenable to deportation.

Varying moral judgments have been passed on certain business habits and the judgments have had a clear relation to the nature of the social organization in which the habits were exhibited. If we assume that

there is to be no marked change in our social organization, we can see a definite movement toward making the moral judgments of to-day part of our actual business habits and in using the legal sanctions for bringing this result about.[1]

We should need no legal sanctions, no doubt, if we could be transported into that Chinese city on whose gate was painted the legend "Virtue is man's only jewel." It was the Shêng Tze Kuo, the Country of Gentlemen, described in the famous story of "Looking-Glass Flowers," Ching Hua Yüan. We read in Mr. Giles's translation:[2]

"By and by they arrived at the market-place where they saw an official runner standing at a stall engaged in making purchases. He was holding in his hand the articles he wished to buy and was saying to the owner of the stall, 'Just reflect a moment, sir, how impossible it would be for me to take these excellent goods at the absurdly low price you are asking. If you will oblige

me by doubling the amount, I shall do myself the honor of accepting them.'"

The student T'ang, however, who tells us all this, appears to have been the last person who knew the way to the Country of Gentlemen, and the injunctions and penalties, rescissions and damages, which we use in regulating purchase and sale have a much more modest purpose than the elaborate self-abnegations of that strange place. Still, an eminent economist, the late Alfred Marshall, thought that chivalry in competition could be attained by voluntary coöperation on the part of competitors, and apparently the suggestion is not an impossible one.

However, since competition — whether chivalrous or not — is likely to continue for an indefinite time, it is fairly certain to be a controlled competition. Yet it is hard to see how any control which has any chance of being carried out in the United States will deprive a certain number of economic groups

of the power they have already attained or even prevent an appreciable increase of that power.

In relation to this power, moral and legal problems arise which make the dishonesties, greed, or competitive trickery of merchants eager to sell their goods profitably seem petty and insignificant enough, almost as petty as the operations of the ancient huckster, the κάπηλος, seemed in the eyes of the great merchant, the ἔμπορος. The conditions of modern life have created a social situation in which the responsibility of the merchants as a class is quite new.

The ancient merchant, Greek or Roman, might well be a speculator and a forestaller and might well consider, in the sweep of his commercial vision, British tin and Indian cotton. But the power he obtained by this sometimes huge wealth he hoped to exercise at leisure after withdrawing from commerce. The medieval merchant expected to die a merchant. He was a member of his class,

and the power he exercised eagerly and ambitiously was the corporate power of his gild. But until the Renaissance his political vision rarely went beyond the city he was proud to govern, and it seems likely enough that the thought of a permanent and nation-wide control of any commodity by a single person or a single group, was as abhorrent to him as to his fellow citizens.

We must remember that, however restricted the name merchant has become, the mercantile idea to-day covers a far greater range of activities than in either ancient or medieval times. Some of those whom we call industrialists and manufacturers, even growers and miners, would in medieval times have seemed to be merchants. A modern great producer does not himself manipulate his material or even direct its manipulation. He arranges for the creation of the products in factories over which he exercises a financial control, and he concerns himself primarily with the disposition of the factory's output.

The directors of our great wool companies could not themselves shear a sheep or card a fleece.

These men are, therefore, dealers in the medieval sense, but on a scale that would have astounded the Greeks and terrified the Middle Ages. It is not too much to say that the material goods necessary for elementary living, of the whole community could, by existing — and certainly by imminent — combinations of merchants, in this larger sense, be so dealt with as to reduce all the rest of the community to the condition of a wage-earning and wholly dependent class. It would be difficult by legal sanctions to prevent a new type of merchants' gild from constituting itself the *de facto* masters of the community, if they earnestly desired to do so.

The entertaining of such a purpose and its execution present the larger moral problem to which I have referred. It is impossible to sever economic power from political

power. Those who have the one inevitably have the other, although clearly enough there is no constant and permanent ratio between the two. If the political power is persistently and systematically exercised to the end of increasing the economic power, we may reach a situation which at the present time most Americans morally condemn.

And political power is in close association with legal power. Business men must some day determine the morality of political and legal action directed to the maintenance solely of their own prosperity either individually or as a combination. Doubtless there are many who will readily convince themselves that what is good for them is good for the country and the world. It may well be. But when Adam Smith found that, by a preëstablished harmony, selfish desire for gain produced general human progress, he made Preëstablished Harmony the duly wedded wife of Laissez Faire, of Free Competition.[3] There seems to have been a

divorce in this happy union. That merging, consolidating, absorbing, is a form of Free Competition will to-day be urged only in briefs of lawyers resisting the application of the Sherman Act.

The world has not yet recovered from the economic and social disaster of four years of wanton destruction. What the face of the world will be within the next two decades, those may tell who know. But in the United States there will very likely be an increase of the power now wielded, in respect of law as of government, by organizations which are essentially groups of merchants — super-merchants, no doubt, but not lifted out of that designation. These men will need no inconsiderable moral fortitude for the proper direction of their efforts. It is unfortunately not probable that they will be much guided in advance by the accredited representatives of the law.

NOTES

INTRODUCTION

1. *De Agricultura, Praef. mercatorem autem strenuum studiosumque rei quaerendae existimo; verum, ut supra dixi, periculosum et calamitosum.*

2. Ecclesiasticus, 26, 20 (29). The passage occurs only in the Greek. The Hebrew text for this chapter is not extant. Cf. also Schechter, S., *Studies in Judaism*, 2nd Series, pp. 72 *seq.* For the older Jewish doctrine, cf. Hosea 12, 7, "He is a merchant: balances of deceit are in his hand"; and for the later view to the same effect cf. Schechter, S., *l.c.*, who quotes the Babylonian Talmud, Erubin, 55b, and Kiddushin, 82a.

3. Cf. Thurnwald, R., s.v. *Handel*, §§ 8 and 9, in *Reallexikon der Vorgeschichte* (1925) 5, 78–81; Moszkowski, *Vom Wirtschaftsleben der primitiven Volker* (1911); *Probleme der Weltwirtschaft*, 5.

The foreign character of the merchant class is still their prominent characteristic in the eyes of Hippodamus of Miletus in the late fifth-century if the passage is genuine (Stobæus, *Florilegium*, XLIII, 93), with whose condemnation we may contrast the approbation of Xenophon in his little book on Revennes of Athens, II, 1, IV, 40. We may further compare the list of foreign merchants in Knorringa, H., *Emporos, Data on*

Trade and Trader in Greek Literature (Amsterdam, 1926), pp. 79 *seq.*

4. The ordinary word for merchant in the Old Testament is "Canaanite" in the Hebrew text. Cf. Proverbs 31, 24.

5. There is a spirited controversy on the rôle played by the Phœnicians in Homeric commerce in which M. Victor Bérard's book, *Les Phéniciens et l'Odysée*, is much discussed. Opposing views are common, especially those of Beloch, *Griechische Geschichte*, I, 2, pp. 66 *seq.*

The more popular view is to deny that the Phœnicians were the chief traders in Homeric times. (Cf. Seymour, T., *Life in the Homeric Age*, p. 61.) But in the period directly after Homer, there can scarcely be any doubt that the Sidonians controlled the carrying trade. For Ægæan times, cf. Glotz, Gustave, *The Ægæan Civilization*, ch. IV. For the Phœnicians as masters of the Egyptian trade, cf. Scylax, *Periplus*, p. 94, Herodotus, I, 1, 2, 41; Thucydides, IV, 53, 3; Strabo, XVII, 792, 801–02.

6. Just how fully ancient commerce was developed is a matter which has in recent times aroused considerable discussion. Of modern investigators, Julius Beloch and Eduard Meyer have dwelt much on the economic development of the ancient world and have been inclined to treat this development as comparable to that of our own times. Their chief opponent in Germany has been the economist, Karl Bücher, who re-

turns to the lists with vigor in his *Beiträge zur Wirtschaftsgeschichte* (Tübingen, 1922), especially pp. 92–98. It will hardly be necessary to take a position on these questions here. Professor Bücher is in a distinct minority.

7. *Iliad*, VI, 235–36.

8. For the notion that commerce was generally condemned in antiquity, we may note the ordinary handbook, Espinas, *Histoire des doctrines économiques*, p. 46; Kautz, *Gesch. Entwickelung der National-Oekonomik*, pp. 59 *seq.* In Ingram's *History of Political Economy* (1923), the theories of Aristotle and Plato (pp. 10–17) are treated as typifying Greek economic thought.

9. Francotte, H., *L'Industrie dans la Grèce ancienne* (1900), I, pp. 18 *seq.*; Huvelin, P., in Daremberg and Saglio's, *Dictionnaire des Antiquités*, 3, pp. 1743–69; Cagnat and Besnier, *ibid.*, pp. 1769–83. For the Roman Empire. Otto, W., *Kulturgeschichte des Altert.* (1925), pp. 77 ff.; Büchsenschütz, B., *Besitz und Ewerb in klass. Altertum.*, pp. 275 *seq*

10. For the position of merchants in Greece, cf. Huvelin, P., s.v. *mercator*, Daremberg-Saglio, *Dict. des Antiquités*, 3, pp. 1731–36, and s.v. *negotiator*, *ibid.*, 4, pp. 41–45; Souchon, Aug., *Les Theories Économiques dans la Grêce Antique* (1898), pp. 87 *seq.*; Knorringa, H., *Emporos, Data on Trade and Traders* (Amsterdam, 1926); Thucydides, II, 40, 1–2; Plutarch, *Pericles*, 19.

11. Mr. A. A. Trever's dissertation, *A History of Greek Economic Thought*, gives a very full discussion of

the Greek doctrines in the subject and discusses fully the important and interesting dialogue, Eryxias (pp. 133 *seq.*), which is also given in full in the admirable collection of documents on *Greek Economic Thought*, by M. W. Laistner; cf. further, Calhoun, George M., *The Greeks and the Evolution of Standards in Business.*

12. Plato, *Laws*, XI, 918a–920c; Aristotle, *Politics*, VI, 4, 12; VII, 7, 3. A Phæacian certainly looked upon trade with contempt as compared with war (Homer, *Od.* VIII, 159), but we do not know how general Homer meant this judgment to be, and the Phæacians may have preferred downright piracy. But cf. *Od.* XIII, 291 *seq.* Cf. in general, Weber, Max, *Zur "Ökonomischen Theorie der antiken Staatenwelt,"* in *Aufsätze zur Sozial- and Wirtschaftsgeschichte* (Tübingen, 1924), pp. 1–45.

13. Cf. V. Tscherikower, *Die Hellenistischen Städtegründungen von Alexander dem Grossen bis auf die Römerzeit* (Philologus, Supplementband XIX, Heft I), Leipzig, 1927. This is the first detailed examination of this interesting topic since Droysen's history of eighty years ago.

14. Cicero, *De Officiis*, I, 42, 151: *mercatura autem si tenuis est sordida putanda est; sin magna et copiosa — non est admodum vituperanda, atque etiam — videtur iure optimo posse laudari.* Still, an ancient law forbade senators to engage in foreign commerce on a large scale. (Livy, XXI, 63, 3.) That may, to be sure, have had a political motive.

15. In Cicero we already find the assumption that to resell what one has just bought cannot possibly be done honestly. (*De Officiis*, I, 42, 150.) *Sordidi etiam putandi qui mercantur a mercatoribus quod statim vendant. Nihil etiam proficiant, nisi admodum mentiantur nec vero est quicquam turpius vanitate.*

16. Statutes against forestalling in England began at least as early as 25 Edward III, St. 4, c. 3. The offense was more precisely defined by 5–6 Ed. III, c. 14, §§ 1–3, in 1551–52. Cf. Holdsworth, W. S., *A History of English Law*, IV, 375 *seq.*; Ashley, W. J., *Economic History*, I, 182 *seq.* The name occurs in Britton and Fleta, 2, 12, § 28. Cf. Ducange, *Glossarium*, s.v. *Foristallare*. The Continental legislation on the subject was less definite and specific than in England. Cf., however, Consuetudines Bituricenses, *Thomasserius*, p. 338, quoted by Ducange, *l.c.*

17. The offenses of forestalling and regrating were still legally forbidden in Blackstone's time, *Comm.*, IV, 158–59, and were not formally abolished till 1844, 7–8 Vict., c. 24, 1. In the United States these offenses were merged in the general prohibition of monopolies. Cf. Standard Oil Co. *v.* United States, 221 U.S. 1, and State *v.* Duluth Board of Trade, 107 Minn. 506, 526.

CHAPTER I

1. Roger North, *Autobiography* (ed. Jessopp, 1887), pp. 131–32, quoted in Kittredge, G. L., *Witchcraft*,

pp. 3–4. Cf., also, in this same limitless repertory, pp. 25 *seq.* We find warnings against popular judgment on this question in Bernard, *A Guide to Grand-Jury Men* (2nd ed., 1629), pp. 23–25, quoted by Kittredge.

2. The law itself recognizes that there is a stage beyond justice when, in the preamble to Elizabeth's second statute against fraudulent conveyances (25 Eliz., c. 5), we read: "not only to the let or hindrance of the due course and execution of Law and Justice; but also to the overthrow of all true and plain dealing between man and man."

3. Wilson, Thomas, *A Discourse Upon Usury* (New York, 1925). This new edition by Mr. R. H. Tawney contains an admirable introduction on usury in England which is probably the best historical treatment of the subject. Wilson's treatise is a mine of information for the general attitude toward trade and finance at the close of the Middle Ages and is in addition an invaluable picture of manners. It will be frequently referred to.

4. The material on execution against the person in Greek law is completely gathered with a full bibliography in Weiss, Egon, *Griechisches Privatrecht, Die Personalexekution*, pp. 495–531. For the extent to which this is found throughout the world, we may refer to Kohler-Wenger, *Allgemeine Rechtsgeschichte* (1914), p. 291. It is important to note that among many primitive people this form of enforcing a debt does not exist. Cf., in addition to the references there given Ankermann, Bernhard, *Das Eingeborenenrecht. Osta-*

frika (1929), p. 370. For Rome, we may refer to Buckland, W. W., *A Textbook of Roman Law*, pp. 615, 639; Wenger, *Institutionem des rom-Prozessrechts* (1925), pp. 213–26. Cf. my article on the execution under the law of the Twelve Tables, Partis Secanto, *Am. J. of Phil.* 43, 32–48. For medieval law cf. Brissaud, Jean, *A History of French Private Law* (Cont. Legal Hist. Series, 1912), pp. 564 *seq.*; Stammler, Rudolf, *Deutsches Rechtsleben* (1928), I, p. 364; Engelmann, Arthur, *A History of Continental Civil Procedure* (Cont. Legal Hist. Series, ed. Millar, 1927), pp. 168, 172. The Canon Law forbade debt-servitude (*Decretals*, X, De Pign. 3, 21, 3), but imprisonment for debt was permitted and was common (Engelmann, *op. cit.*, pp. 490–91).

5. The abuses of imprisonment for debt were portrayed in several of Dickens's novels, especially *Pickwick Papers* and *Little Dorrit*, and these pictures powerfully aided in the abolition of the system.

6. Body arrest for default in payment of a debt was abolished in England in all but six enumerated cases by the Debtors' Act of 1869. The excepted cases are largely concerned with the violation of a fiduciary duty. In the United States most constitutions and many statutes have specifically abolished imprisonment for debt, but in many States, imprisonment for debts arising out of torts — i.e., civil wrongs — is permitted, and the difference between a civil wrong and the breach of a contractual obligation is not always easy to discover.

7. These matters are highly controversial topics of

ancient history. There is no agreement among historians in detail, but the general effect of the situation created by Solon seems to be clearly what I have stated. The importance of the tribunician power in the restriction of debt-servitude lessened when the tribunician office was practically controlled by the senatorial oligarchy.

8. The most recent treatment of the subject is to be found in Levet, *Le Bénefice de Compétence* (Grenoble, 1927). P. P. Zancucchi, in his article, *Sul cosidetto beneficium competentiæ*, *Bull. del Inst. di Dir. Rom.* 29 (1916), pp. 61–103, vigorously presents one side of the issues which have been raised in connection with this institution. The question is whether it was in reality a qualified discharge or merely a temporary exemption of necessaries from execution. Cf. further, Wünsch, *Zur Lehre vom ben. comp.* (Leipzig, 1897). A full history of the subject is given in Zipperling, Albert, *Das ben. comp. in römischem Recht*, Pt. I (Marburg, 1906).

9. The list of cases in which the *beneficium competentiæ* was permitted is given by Buckland, W. W., *Text-Book of Roman Law*, pp. 687–88. The most characteristic statement of it in the sources is *Dig.* 50, 17, 173. The phrase seems to be no older than the seventeenth century, Altmann, *Das beneficium competentiæ* (1888), p. 48. There was a somewhat similar practice in Ptolemaic Egypt; Wenger, Leop., *Archiv. f. Pap.*, II, 494 *seq.*

10. Cicero quotes it as a well-known proverb, *De Off.*,

I, 33. It had already appeared in a slightly different form in Terence, *Heaut.*, V, 796. We find its substance in Gaius, *Dig.*, IV, 30, and in a phrase of Celsus, D., 6, 1, 38. The importance of the idea and its development is traced in an admirable paper of Johann Stroux, *Summum ius summa iniuria*, in *Festschrift für Speiser-Sarasin* (1926), translated by Funaioli, with a preface by S. Riccobono; *Ann. sem. Giur* (Palermo), XII, 639–91.

CHAPTER II

1. Ulpian, *Liber Singularis Reg.*, II, 11; *Dig.*, I, 12, 1, 11. The elaborate discussion of the phrases *iustum pretium* and *iusta æstimatio* by E. Albertario, in *Bull. del Ist. di Dir. Rom.*, XXXI (1921), pp. 1–20, is an illustration of method rather than an historical examination. The expression *iustum pretium* is used by Gaius, *Dig.*, 30, 66; and is quoted by Ulpian from some previous imperial decree, *Dig.*, 47, 11, 6, pr.

2. Plato, *Laws*, 917, c d e.

3. For a sympathetic presentation of the medieval doctrine of the just price, cf. O'Brien, George, *An Essay on Medieval Economic Teaching* (London, 1920), pp. 102–55.

4. Cf. the discussion in Ashley's *Economic History* (1892), ch. III, pp. 132–48. The late President Hadley's little volume, *Standards of Public Morality*, may be said to represent economic orthodoxy on this subject. The "just" price of the schoolmen was of course a dif-

ferent thing from the "natural" price of Adam Smith (*Wealth of Nations*, I, ch. VIII); or the "fair" price of modern adjustments. The determination of a fair value of corporate property is particularly pressing in matters of modern public administration; cf. the Rating and Valuation Act of 1925 in England, and the struggles of the United States Supreme Court in rate cases. A recent discussion will be found in Bonbright, J. C., "The Problem of Judicial Valuation," 27 *Col. Law Rev.*, 493–522, and Bemis, E. W., "Going Value in Rate Cases," 27 *Col. Law Rev.*, 530–46. For the whole subject, cf. Eddy, A. J., *The New Competition*, pp. 242–78.

5. They were Pomponius (2nd century), cited by Ulpian, *Dig.*, 4, 4, 16, 4; and Paul, *Dig.*, 19, 2, 22, 3. Mr. Hadley (*op. cit.*, 35) misses the point of the word *circumscribere*, which Ashley (*Economic History*, pp. 132–33) understands somewhat better. Both jurists are stating the law, not approving it. But Cicero treated freedom of bargaining as an axiom established by ancient usage (*Verr.*, IV, 5, 10): *maiores nostri putabant ereptionem esse, non emptionem, cum venditori suo arbitratu vendere non liceret.*

6. The principle is apparently set forth in a constitution of Diocletian of the year 285 A.D. (*Code Just.*, 4, 44, 2.) Cf. my *Textbook of Roman Law* (1927), pp. 233–35. It is generally believed to be of later origin, but that is after all not quite certain. Its late character is especially maintained by Solazzi, S., *L'origine storica della rescissione per lesione enorme, Bull. del Ist. di Dir.*

Rom. XXX (1921), pp. 51–87. For varying opinions as to what the late Roman doctrine really covered, cf. Krall, Walther, *Die Anfechtung der Vertrage wegen laesio enormis* (Bonn, 1896). Even if the institution is later than Diocletian, a departure from the old Roman principle as stated by Cicero had certainly occurred in the third century. Diocletian had published an Edict of Prices, in which the maximum to be charged for any commodity was fixed. *Corp. Inscr. Lat.*, III, 801; Blümner, Pauly-Wissowa, *Realenz.*, V, 1948 ff. (also a separate edition of the Edict by Blümner in 1893). An economic commentary is given by Karl Bücher, *Beiträge zur antiken Wirtschaftsgeschichte* (1922), pp. 179–89. It seems to be the only attempt to do in ancient times what was so frequently done in the Middle Ages. The fixing of a price at which goods must be sold to the government was, however, fairly common. Cf. *Revenue Laws of Philadelphus* (1896) and Wilcken, U., *Griechische Ostraka*, I. The Edict of Prices is represented by Lactantius (*De Mortibus Persecutorum*, ch. 7) as a desperate attempt to combat a desperate situation.

7. French Civil Code, §§ 1674–83. German Civil Code, BGB, § 138; Swiss Code of Obligations, § 21. Cf. Dijol, Marcel, *La Justice dans les Contrats et les Obligations Lésionnaires* (Paris, Sirey, 1918).

8. White *v.* Damon, 7 Ves. 30; Underhill *v.* Horwood, 10 Ves. 209.

9. Cockell *v.* Taylor, 15 Beav. 103.

10. Cf. the cases collected by Pomeroy on *Equity Jurisprudence* (2nd ed.), §§ 2212 *seq.* There are still a number of American States which hold the contrary, in some cases in accordance with special statutes embodying the more equitable rule. (California, Civ. Code, § 3391, 1.)

11. Coles *v.* Trecothick, 9 Ves. 246. Sir Samuel Romilly had argued for the same doctrine as an advocate (Titly *v.* Peers, 10 Ves. 301).

12. Abbot *v.* Sworder, 4 De G. and Sm. 448, a decision by Vice-Chancellor Knight Bruce. In California, under the statutory rule, two thousand dollars was held inadequate as consideration for a house worth eight thousand and renting for thirty-five dollars a month. (O'Hara *v.* Lynch, 172 Cal. 525, 157 Pac. 608.) But not a case in which the disparity was one thousand dollars in a total value of twenty thousand. (Schader *v.* White, 173 Cal. 441, 160 Pac. 557.)

13. Wood, H. G., "The Influence of the Reformation of Ideas of Wealth and Property," in *Property* (1915), pp. 135–67; and especially, Troeltsch, Ernst, *Die Soziallehre der christlichen Kirchen und Gruppen* (1912), pp. 127 ff.; 705 ff.; 720 ff.; J. S. Schapiro, "Social Reform and the Reformation" (1909), *Studies in History, Economics, and Public Law*, vol. 34, pp. 20–39.

14. For traffic in money in ancient Mesopotamia, cf. Lutz, H. F., "Money and Loans in Ancient Babylonia," *Un. of Calif. Chron.* (April, 1924), pp. 125–44.

15. Aristotle, *Politics*, I, 10 (1258 c.); *Nic. Eth.*, 4, 3, 1121 b 34.

16. *De Aere Alieno Vitando*, Plutarch's *Moralia*, X, 827 d *seq.* Wilson in the *Dialogue on Usury* makes much of Plutarch's authority (p. 333), "Thus farre Plutarche that great lerned Clarke."

17. "The ordinary Athenian citizen hates money-lenders," is stated in Demosthenes against Pantænetus, § 52, 981. Demosthenes deprecates such an attitude in this speech, but in the first speech against Stephanus (69–70, 1122–23) — if it is by Demosthenes — he uses the odium of money-lenders effectively. Cf. Alciphro, *Epistles*, I, 26, III, 3, 2.

18. For money lent at interest in Ptolemaic Egypt, cf. Robiou, Felix, *Mémoire sur l'Économie Politique — au temps des Lagides* (Paris, 1875), pp. 99 *seq.* A Delphic law of the fourth century limited interest to 6 (or 8½) per cent as an emergency measure. Homolle, Th., *La loi de Cadys* (B. C. H. 1926), 3–106.

19. Plato, Alcib. I, § 18. Posidonius ap. Athenæum, *Dipnos.*, VI, 24; Fustel de Coulanges, s.v. *Lacedæmoniorum Respublica*, in Dar.-Saglio, *Dict. des Ant.*, III, 889–90.

20. Interest at Athens, as generally in Greece, was free. A law of Solon specially so provided. Lysias, c. *Theomnestus* (X), § 18.

The effect of the Solonic seisachtheia was controverted even in ancient times. (Plutarch, *Solon*, § 15.) Cf. Billeter, *Gesch. des Zinsfusses*, pp. 5 *seq.*; Linforth, I; *Solon the Athenian*, pp. 269–74. (*Un. of Calif. Publ. in Class. Philology*, 6, 1919.) A similar revolutionary

measure took place at Ephesus. (Waddington, *Inscr. de l'Asie Mineure*, No. 136 A.)

21. The story is told that, in the time of Agis, all records of debts were publicly burned. (Plutarch, *Agis*, 13.)

22. The *Lex Genucia* was passed in that year, after the rate had been at least three times fixed by previous statutes. Livy, VII, 42; Appian, *Bell. Civ.*, I, 54. Cf. Rotondi, G., *Leges Publicæ Populi Romani*, p. 226; Klingmiller, *Zeit. der Sav. St.* (röm. Abt.), 23, 72 *seq.*, and article *fenus* in Pauly-Wissowa, VII, 2187 *seq.*; Cuq. Ed., *Institutions juridiques*, I, pp. 118–20. Cf. also Baudry, s.v. *Foenus*, Dar.-Saglio, *Dict. des Ant.*, 2, 1214 *seq.*

Some writers have supposed that what Genucius prohibited was compound interest. That is contradicted by our sources and supported only by a curious unwillingness to admit the possibility of a statute lapsing by desuetude.

23. Cato, *De Agricultura*, *Præf.* Cf. also the story in Cicero, *De Officiis*, II, 25, 89. Cicero himself is a witness to the unpopularity of money-lenders (De Officiis, I, 42, 152), where they are grouped with the tax-collectors, the publicans of the New Testament. And yet, without any expressed disapproval on Cicero's part, his most intimate friend, Atticus, lent money at high rates of interest.

24. Plutarch, *Cato Major*, c. XXI.

25. In Cicero's time, the accepted maximum was

12 per cent, the *centesimæ usuræ*, 1 per cent per month, just as it was generally in Greece. *Ep. ad Att.*, 1, 12, 5. The usual rate was from 4 to 8 per cent per year. Cicero, *ad Att.*, 4, 15, 7; *ad Q. Fr.*, 2, 14, 4. Columella, *De Re Rustica*, 3, 3.

26. *Cod. Just.*, 4, 32, 26, *Nov.* 32 and 34. There is a dubious reference to an attempt by Alexander Severus to limit interest to 4 per cent. (Lampridius, *Alexander*, 2, 6.) Cf. *Cod. Theod.*, II, 33, 1.

27. The most complete discussion of interest on money in classical antiquity is to be found in Billeter, *Geschichte des Zinsfusses im Altertum*, already quoted.

28. In his *Liber de Tobia*, Migne, *Patrologia Latina*, vol. 14.

29. For the attitude of the Church toward usury before Constantine, cf. G. Uhlhorn, *Die Christliche Liebestatigkeit in der alten Kirche* (1882), I, pp. 376 ff.; Dopsch, Alfons, *Grundlagen der europäischen Kulturentwickelung*, II (2nd ed., 1924), pp. 227 *seq.*, who quotes Fedor, *Das Christliche Zinsverbot* (Festg für Finke, 1904), p. 139, and Schaub, F., *Der Kampf gegen den Zinswucher, ungerechten Preis und unlauteren Handel im Mittelalter* (1905), p. 33. See also Funk, *s.v. Wucher*, in F. X. Kraus, *Realenz. des Chr. Altertums*, and J. Dow, *s.v. Usury*, Hastings, *Enc. of Rel. and Ethics*, XII, 550 *seq.*

30. Cf. Tawney's Introduction to Thomas Wilson, *Dialogue on Usury* (1925), pp. 16–172. The Swabian J. Pflaumer, in his *Colloquium von Etlichen Reichstag-*

Puncten, written after 1641, illuminates the popular situation in Germany as much as Wilson's book does that of England. The edition of 1893 contains an excellent introduction by Eberhard Gothein, pp. i–xcvii. Johannes Janssen, *Geschichte des Deutschen Volkes* (16th ed.), I, pp. 384–450, and E. Michael, *Geschichte des Deutschen Volkes* (1897), I, pp. 162–204, present a vivid picture of the economic conditions of Germany at the close of the Middle Ages, but one that is somewhat colored by controversial needs.

31. Wilson, Thomas, *op. cit.*, p. 234.

32. Cf. the lists in Ryan, F. W., *Usury and Usury Laws* (1924). Mr. Ryan and many others advocate the abolition of all usury laws and the substitution of Small Loan Acts in their place.

33. Coffin, William Tristan, "Usury in California," in 16 *California Law Rev.*, pp. 281–97, 387–424.

CHAPTER III

1. Com. *v.* Waner, 6 Mass. 72; State *v.* Sampson, 10 N.C. 620; Com. *v.* Springer, 8 Pa. Co. Ct. R. 115. But cf. State *v.* Reiff, 14 Wash. 664, 45 Pac. 318.

2. We may refer to any textbook on the law of sales. Much the fullest in the cases quoted, is Williston on Sales (2nd ed., 1924), I, pp. 195–210; 624–30.

3. Cf. the glowing tribute to the common law practice by the Supreme Court in the case of Barnard *v.* Kellogg, 10 Wall. 383, 388.

4. Labeo, quoted by Ulpian, *Dig.*, 4, 3, 1, 2. Cf. also *Dig.*, 18, 1, 43, 2.

5. Buckland, W. W., *A Text-Book of Roman Law*, pp. 488–89. The edict does not appear to have been general in the time of Cicero and Varro, but already covered slaves. (Cicero, *De Off.*, 3, 17, 71; Varro, *de R. R.*, 2, 2, 2, 5.) For the edict and its terms we may compare *Dig.* 21, 1, in general, and Lenel, O., *Edictum Perpetuum* (3rd ed., 1927), pp. 554–68.

6. Ashley, W., *Economic History*, Book I, pp. 140–47; Endemann, *Studien in der rom.-can. Wirtschafts- und Rechtslehre*, II, 37; Aquinas, *Summa*, 2, 2, q. lxxvii, art. 2; J. B. Corradus, *Resp. Cas. Q.*, 51, p. 66.

7. It must, however, be mentioned that in the medieval Common Law, mistake and inadvertence and even ignorance were not without protection, even when there was no fraud. It was said: *Deus est procurator fatuorum*, Y. B., 8 Ed. IV, Pasch. pl. 11; Holdsworth, *Hist. of English Law*, V, 292.

8. Cro. Jac. 4 (1625).

9. Trollope, Anthony, *Phineas Redux*, III, 71.

10. Most Common Law courts are, of course, aware of the difference between the Common and the Civil Law in this respect: Hargous *v.* Stone, 5 N.Y. 73, 81. As for the Latinity, *cavere* regularly means to give security, and the normal meaning of *caveat emptor* would be, "Let the buyer give security." *Sibi cavere* would carry some of the implication intended by the Common Law maxim.

11. The rules of implied warranty in the English Sale of Goods Act, § 14, and the American Uniform Sales Act, § 15, have seriously modified the doctrine of *caveat emptor.*

12. Advertising has no inconsiderable history. Cf. Cronau, Rudolf, *Das Buch der Reklame* (1887). Wolff, F., and Crisolli, K., *Das Recht der Reklame*, 1929; Handler, M., *Fake and Misleading Advertising*, 39 Yale Law Journ. 22. Mr. Giuseppe Castelli has promised a book on the whole subject (*Il richiamo* [*La réclame*] *nelle ragioni psicologiche, storiche, morali estetiche, economiche* [G. Barbera, Florence]), which I have not seen. His brief article on *La "Réclame" nell' antichità* (*Riv. d'Italia*, 1915, 18, pp. 889–902) makes evident enough the wide gulf between ancient attempts and modern accomplishments. I may add two other studies which I have also been unable to procure: Paneth, E., *Entwickelung der Reklame*, and Zur Westen, Walter v., *Antike Reklame* (Ex Libris, 35), pp. 28–36.

13. 84 N.J. Eq. 469, 94 Atl. 570.

14. 89 N.J. Eq. 149, 102 Atl. 16.

15. Le Blume Import Co. *v.* Coty, 293 Fed. 344.

16. 3 Fed. (2nd), 891.

17. Leather Cloth Co. *v.* Am. Leather Cloth Co., 11 H.L. Cases 523 (1863).

18. Contrast Newman *v.* Pinto, 4 R.P.C. 508, 57 L.T. 31, with Hargreaves *v.* Freeman (1891), 3 Ch. 39, 8 R.P.C. 237. Only malice would note that in the

former case the cigars were of German manufacture and in the latter, of British.

19. California Fig Syrup Co. *v.* Taylor's Drug Co. (1897), 14 R.P.C. 341.

20. Worden *v.* California Fig Syrup Co., 187 U.S. 516 (1902).

21. Sears Roebuck & Co. *v.* Federal Trade Commission, 258 Fed. 307 (1919).

22. 4 Fed. (2nd), 759 (1925).

23. Federal Trade Commission *v.* Bradley, 31 Fed. (2nd), 569.

24. The first section of the German U.W.G. deals with false representations by advertisement and makes them penal. Cf. Barczinski, Arthur, *Reklame und Recht*, 1909; Weltner, Anton, *Unlauterer Wettbewerb in Reklameschriften* (Köln, 1928).

25. Prov. 27, 2.

26. Royal Baking Powder Co. *v.* Federal Trade Commission, 281 Fed. 744; Royal Baking Powder Co. *v.* Donohue, 265 Fed. 406.

27. The following may be taken to be examples: Adams, Henry Foster, *Advertising and its Mental Laws* (New York, 1920); von Hartungen (Herting), Ch., *Psychologie der Reklame* (2nd ed., 1926); Calkins, Earnest Elmo, *The Business of Advertising* (New York, 1915); Russell, Gilbert, *Nuntius* (*To-Day and To-Morrow*) (New York, 1926).

CHAPTER IV

1. The movement for arbitration in commercial disputes is an outgrowth of that aspect of business ethics which concerns the relations of merchants as a group to others in the same group. It is too vast a subject to be considered incidentally. As a sign-post in the field, a little book by Mr. C. F. Birdseye, *Arbitration and Business Ethics* (New York, 1926), may be cited. Even a selected bibliography would almost necessarily number hundreds of items. It is perhaps worth while indicating that, although the largest moral terms are used in justifying the jurisdiction of arbitral tribunals, the rationale of most arbitral decisions is likely to be convenience or expedition rather than a nice adjustment of moral claims.

2. Cf. Eddy, Arthur Jerome, *The New Competition* (Chicago, 1920), especially pp. 58–104. For an attempt to restrain the competitive impulse by religious considerations, cf. *Competition*, a series of essays by five Anglican Churchmen, London, 1917.

3. Monopoly as a governmental institution is very old. It was practiced by the Greek communities (Aristotle, *Politics*, I, 4, 6, 1259 a); and was a particular mark of the Ptolemaic organization, which became so much of a model for the later imperial system. Cf. *The Revenue Laws of Philadelphus* (1896), with B. Grenfell's full commentary; U. Wilcken, in *Mitteis-Wilcken, Grundzüge der Papyruskunde*, I, pp. 239–58,

and K. Riezler, *Über Finanzen und Monopole im alten Griechenland* (1907). For the hatred of monopoly in England after the Reformation, cf. the already quoted essay of H. G. Wood, "The Influence of the Reformation," etc., in *Property* (1915), pp. 146–49. Cf. also, Maurice Dobb, *Capitalist Enterprise and Social Progress* (London, 1925), pp. 97–113, 143–77, and for the medieval monopoly, pp. 204–21, 298–303.

4. The law regulating unfair competition has been made the subject of a special statute in Germany — a statute which has been largely used as a model for similar legislation elsewhere. The German law of May 27, 1896, was treated as creating a group of special cases of tort which the later and general section of the BGB, § 826, somewhat enlarged. There are many commentaries, of which two may be mentioned: Wassermann, M., *Der unlautere Wettbewerb* (1st ed., 1907), and Finger, Chr., *Kommentar zum Wettbewerbgesetz.* (2nd. ed , 1907). The later editions of these books, in 1911 and 1910, respectively, deal with a later statute, the law of June 7, 1909, which attempts a general definition. Cf. Kuhn, E. F., *Das Gesetz gegen den unlauteren Wettbewerb vom 7 Juni, 1901* (Mannheim, 1911), and Reusch, G., *Die 823, 824–26, BGB und die Gesetze gegen den unl. Wettb.* (Gottingen, 1916).

In France, a complete system of protection against unfair competition had long been derived from the general tort sections of the *Code Civil*, 1382–83, under which a distinction was attempted between *concurrence*

illicite and *concurrence déloyale.* Thaller, E., *Traité de Droit Com.*, § 95. Similarly, in Switzerland (except in some cantons), Belgium, Holland, and Italy, the Civil Codes seemed adequate without a special statute. Cf. the treatise of Pouillet, *Traité des Marques de Fabrique et de la Con. Dél.* (Paris, 1906); Di Franco, *Trattato di concorrenza sleale* (Torino, 1907). A brief history of the subject and a comparison with English law is given in an Erlangen dissertation (1928), *Die englische Rechtsprechung zur Bekampfung*, etc., by K. S. Schmidt.

5. It is for that reason that I shall omit in this discussion the many cases of libel and slander and of inducing breach of contract, which are specially examined in all treatises and statutes on unfair competition. The violation of trade secrets, on which there is a large literature, might more properly come within this chapter. It is omitted merely because of its patent immorality and illegality.

6. Mitchel *v.* Reynolds (1711), 1 P. Williams, 181, 1 Smith's Leading Cases (12th ed.), p. 458.

7. L.R. 23, Q.B.D. 598.

8. Am. Bank Co. *v.* Fed. Res. Bank, 256 U.S. 358.

9. Tuttle *v.* Buck, 107 Minn. 145.

10. Beardesly *v.* Kilmer, 236 N.Y. 80.

11. Dunshee *v.* Standard Oil Co. (1911), 152 Iowa 624, 132 N.W. 371.

12. Boggs *v.* Duncan-Shell Furniture Co. (1913), 163 Iowa 115, 143 N.W. 482.

13. The history of the entire subject is set forth in the excellent book of Dr. Frank I. Schechter, *The Historical Foundations of the Law Relating to Trade-Marks* (New York, 1925). Dr. Schechter is concerned primarily with the English development. The relatively recent character of the protection — for Dr. Schechter makes clear that the Elizabethan case of Southern *v.* How was not properly a trademark case (pp. 5–10) — may be compared with an equally slow growth of the idea of industrial property elsewhere.

14. 15 R. II, c. 10 (Stat. of Realm, ii, p. 81), quoted in Schechter, *op. cit.*, p. 82.

15. H. T. Riley, *Mem. of London and London Life*, p. 118; Schechter, *op. cit.*, p. 46.

16. Acts of Privy Council, N.S. xxii, 1591–92, pp. 406–07; Schechter, *op. cit.*, pp. 87–88. To the instances there given from England and the Continent one may add the emphatic words of the *Statuta mercatorum* of Rome (14th century); Gatti, *Statuti dei mercanti di Roma*, p. 135; and the *Statuta* of Florence of 1415, III, 143.

17. Schechter, Frank, "The Rational Basis of Trade-Mark Protection," 40 *Harv. L. Rev.*, 803. For the innumerable discussions abroad on this subject we may note the book of Kohler, Josef, *Warenzeichenrecht* (1910); Eismann, B. K., *Die Rechtsnatur des Warenzeichenrechts* (Erlangen diss.), 1913.

18. Chase, Stuart, *The Tragedy of Waste* (1925), and *Your Money's Worth* (New York, 1928), in collabora-

tion with F. J. Schlink. Cf. also *The New Republic*, vol. 44, pp. 100, 126, 179, 183.

19. Mayor of Colchester *v.* Goodwin (1664), Carter, 114, 120.

20. Blanchard *v.* Hill, 2 Atkyns, 487.

CHAPTER V

1. Mr. Maurice Dobb in his book, *Capitalist Enterprise and Social Progress* (London), gives us an excellent analysis, thoroughly documented historically, of the tendencies in modern industry.

2. Giles, H. A., *History of Chinese Literature*, pp. 147–49. A fuller extract appears in Mr. Giles's *Gems of Chinese Literature* (2nd ed., 1923), I, 251–56.

3. Smith, Adam, *Theory of Moral Sentiments* (1st ed.), pp. 290 *seq.*